File Ref: C2/1/12C(99)IX

LEGISLATIVE COUNCIL BRIEF

Companies Ordinance
(Chapter 32)

COMPANIES (AMENDMENT) BILL 2000

INTRODUCTION

At the meeting of the Executive Council on 4 January 2000, the Council ADVISED and the Acting Chief Executive ORDERED that the Companies (Amendment) Bill 2000, at Annex A, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

The Law Reform Commission's Report on "Corporate Rescue and Insolvent Trading"

2. At present, Hong Kong companies that run into financial difficulties may try to come to a voluntary arrangement with their creditors or by means of the arrangement and reconstruction provisions under section 166 of the Ordinance. However, there is nothing in section 166 to prevent a creditor presenting a petition to wind up the company, an event which could have the effect of ending the formulation of any proposal to creditors. The Law Reform Commission (LRC) considers that the major deficiency with section 166 is the lack of a moratorium that can bind creditors while an arrangement plan is being formulated.

3. The LRC therefore recommended in 1996 in its Report on "Corporate Rescue and Insolvent Trading" that Hong Kong should introduce a corporate rescue procedure. Under the proposal, there would be a statutory stay of proceedings which would protect a company from actions against it by its creditors during the period of the moratorium thus providing a breathing spell to a viable business in financial difficulty to restructure and survive as a going concern. The recommendation was made after public consultation on the subject by the LRC Sub-Committee on Insolvency in 1995.

Main features of corporate rescue/provisional supervision

4. The LRC sought to formulate a corporate rescue procedure that would be cheap, quick, simple and effective with minimal involvement of the court to save time and costs. The two main features of a statutory corporate rescue are -

(a) the introduction of a *moratorium* (stay of proceedings) which will protect the debtor company from creditor action for an initial period of 30 days and thereafter an extension of up to six months from the commencement of the moratorium subject to the court's approval; and

(b) the taking over of the control of the company during the moratorium by an independent professional third party, the *provisional supervisor*, who will formulate a voluntary arrangement proposal for creditors within the specified time-frame.

------- A summary of the LRC's recommendations is at Annex B.

"Debtor in possession" concept not recommended

5. The corporate rescue model proposed by the LRC is based largely on the Australian and Canadian provisions[1]. In putting forward its proposals, the LRC has been mindful that corporate rescue procedure should not be used by unscrupulous directors as a vehicle to avoid their obligations. The concept of "debtor in possession"[2] used in Chapter 11 of the US Bankruptcy Code was not accepted by the LRC as they did not believe that creditors in Hong Kong would accept it. The LRC believed that allowing the independent provisional supervisor to take effective control of the company during the corporate rescue period would be the best safeguard against possible abuses.

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[1] The LRC had researched into the systems for corporate rescue in various jurisdictions including the United Kingdom, Australia, Canada, the United States and Singapore.

[2] A Chapter 11 case allows a debtor who intends to reorganize his business to continue to operate his business as a "debtor-in-possession" under the protection of the court. The debtor will seek to down-size or close non-viable operations, effect changes in management, etc. and to negotiate with creditors to repay part of their debts and creates a business entity as a going concern.

The moratorium

6. Under the LRC proposal, the moratorium would commence at the same time as the corporate rescue procedure (the provisional supervision), that is, upon the filing of a resolution of the company or the board of directors and the consent of the provisional supervisor to act. The initial moratorium period is 30 days, after which, if the provisional supervisor finds that he needs more time to formulate a proposal for creditors, he may apply to the court to extend the moratorium for any period up to a maximum of six months from the commencement of the moratorium. Thereafter, only the creditors may resolve to extend the moratorium further, but it would not be necessary to seek the court's approval for such extensions.

7. During the moratorium, no application for the winding up of the company by the court may commence or be continued; no receiver of the assets of the company may be appointed; no steps may be taken to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession; no proceedings or other process may be commenced or continued against the company or its property, and no right of forfeiture or of entry or re-entry may be exercised.

Exemptions from the application of the moratorium

8. The LRC has recommended that eligible financial contracts, for example currency or interest rate swap agreement, or an agreement to buy, sell securities, should be exempted from the moratorium. These dealings occur in certain closed markets, such as the central clearing and settlement system of the Stock Exchange. To impose a moratorium on such contracts could involve unraveling innumerable other contracts which would cause chaos in the market concerned.

9. There are also situations where the moratorium should not be applied. First, to enable a company to continue with its normal business during the provisional supervision, it would need to maintain the necessary credit facilities with its business partners. The LRC therefore proposed that debts and liabilities incurred by the company after the initiation of the corporate rescue procedure should not be affected by the moratorium. Secondly, any resumptions by the Government pursuant to a Government lease or otherwise should be exempted from the moratorium.

The Provisional Supervisor

10. Once appointed, the provisional supervisor would effectively take charge of the company. To inspire confidence, he must be independent, with integrity and possess the necessary expertise. The LRC recommended that provisional supervisors should only be selected from a panel of practitioners operated by the Official Receiver and comprising solicitors and professional accountants. The Official Receiver may also approve suitably qualified independent persons as provisional supervisors.

11. The provisional supervisor would be empowered to manage and control the company and would be acting as the agent of the company in the exercise of his powers. He has the right to retain or dismiss directors of the company. He may exclude any class or classes of creditors from the moratorium and would be personally liable for any contract entered into by him in the performance of his functions. He would be indemnified out of the assets of the company. The functions of the provisional supervisor are summarized in paragraph 25 of Annex B.

12. The LRC anticipates that in practice, before a provisional supervision is initiated, a company must consult with its major secured creditors to get them onside. For a company to act otherwise will be ill-advised, as major secured creditors will have the power under the legislation to opt out of a moratorium within three working days after receipt of notification by the provisional supervisor, and the provisional supervision will cease immediately. As soon as practicable after the provisional supervisor has ascertained the financial position of the company, he should decide whether the purposes of a voluntary arrangement are capable of being achieved. When the provisional supervisor has formulated a plan, he will call a meeting of creditors to consider it. He will also report to creditors if he is unable to formulate a plan, or decides that none of the purposes of the voluntary arrangement can be achieved. The meeting should resolve to terminate provisional supervision and to wind up the company as a creditors' voluntary winding up.

Effects of a voluntary arrangement

13. When a voluntary arrangement plan has been approved by creditors[3], the provisional supervision will cease and the terms of the voluntary arrangement would take effect. The voluntary arrangement will be binding on every creditor, on the company and its members. Accordingly, no creditor bound by the arrangement may commence or continue any winding up proceedings or receivership action or any other legal process against the company.

Insolvent trading

14. In relation to the introduction of a corporate rescue procedure and in order to encourage directors and senior management to act on insolvency earlier rather than later, the LRC has recommended that directors and senior management be made personally liable for the debts of a company which traded while insolvent. The introduction of the "insolvent trading" provisions would encourage directors and senior management to face the fact that a company was slipping into insolvency at an early date and cause them to address the situation.

Our position

15. We see merits in introducing a cheap, quick and effective statutory corporate rescue procedure in Hong Kong. Businesses in difficulties would be given an opportunity to attempt to turn around. Employment that would otherwise disappear might be preserved, at least to some extent.

16. We henceforth propose to adopt the LRC model for corporate rescue in the Bill, <u>except</u> in the following main areas where we propose to deviate from the LRC recommendations as outlined below.

(a) outstanding wages and other entitlements owed to employees who are laid off by a company in provisional supervision

17. The LRC has recommended that in case outstanding wages and

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[3] For any resolution to pass at a meeting of creditors, approving a proposal or modified proposal, there should be a majority in number and in excess of two thirds in value of the creditors present in person or by proxy and voting on the resolution.

other entitlement are owed to employees who are laid off by a company undergoing corporate rescue, those employees should be allowed to make an application for ex-gratia payment from the Protection of Wages on Insolvency Fund (the PWIF). This in effect would widen the present scope of the PWIF, which, as it stands, is only triggered by the presentation of a winding up petition against the company.

18. We conducted a three-month consultation on this subject in December 1998. A copy of the relevant consultation paper and the report on the consultation exercise are at Annexes C and D respectively.

19. While supporting corporate rescue in principle, none of the employers/employees groups supported the proposed change in use of PWIF. They feared that there could be abuse by unscrupulous employers who might first lay off employees and then evade their statutory responsibility of paying arrears of wages/entitlements by passing the burden to the PWIF. Both the Labour Advisory Board and the PWIF Board expressed strong reservation on this particular LRC proposal.

20. Taking into account the strong views expressed, we propose that the company undergoing corporate rescue must be responsible for clearing all arrears of wages, severance pay and other statutory entitlements of its employees as if it is a going concern. This is desirable because employees' rights will then be fully protected; and that it would help remove opportunities for possible abuse of PWIF in the course of corporate rescue.

(b) companies to whom the rescue procedure would not apply

21. The LRC has recommended that the corporate rescue procedure should apply to local as well as oversea companies formed/registered under the Companies Ordinance. The only exception is the authorized institutions (AIs)[4] which are regulated by the Hong Kong Monetary Authority under the Banking Ordinance (Cap. 155). The LRC held the view that the corporate rescue provisions should apply to insurance companies and the securities and futures industry.

22. We have no difficulty with the exemption of AIs. However, we have reservation in allowing provisional supervision to be applied to

[4] Under the Banking Ordinance, authorized institutions include banks, restricted licensed banks and deposit taking companies.

insurance companies and registered entities in the securities and future industry. Similar to AIs though varying in degree, these entities are already regulated by law which empowers the regulator to assume control of the regulated entity or oblige the entity to act in a certain manner in case the entity has financial difficulty.

23. We therefore propose that provisional supervision should not apply to insurers who are regulated under the Insurance Companies Ordinance; registered dealers and other persons regulated under the Securities Ordinance (Cap. 333) (SO) and the Commodities Trading Ordinance (Cap. 250) (CTO), and licensed leveraged foreign exchange traders under the Leveraged Foreign Exchange Trading Ordinance (Cap. 451) (LFETO).

(c) who may initiate provisional supervision

24. The LRC was of the view that whoever has the power to initiate provisional supervision should do so from a position of knowledge of the company's financial position and prospects. It therefore recommended that the company or its directors, liquidators and receivers[5] should be able to initiate the procedure in appropriate circumstances.

25. In respect of receivers, the LRC only included them into the above list with hesitation. It is arguable that there could be a conflict of interest for a receiver turned provisional supervisor in terms of whose interests he served – the creditor who appointed him as receiver, the company, or all the creditors of the company.

26. On careful consideration, we are convinced that the possibility of a conflict of interest does exist if a receiver is allowed to turn into a provisional supervisor, because the receiver would not be able to change the direction of a receivership without the agreement of the creditor who appointed him. In order to avoid any possible conflict of interests, we recommend that receivers should not be allowed to initiate provisional supervision.

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[5] Receivers are appointed primarily to realize the company's assets comprised in the debenture holders' security, to distribute the proceeds of sale to the debenture holders in satisfaction of their claims, and to return any surplus or unrealized assets to the company which may then continue with its business or, if it is insolvent, go into liquidation. [Vanessa Stott, Hong Kong Company Law Eighth Edition]

Regulatory powers of the Securities and Futures Commission over listed companies

27. The LRC Report is silent on the regulatory powers of the Securities and Futures Commission (SFC) over listed companies. When a moratorium is in force, no party may initiate legal proceedings against the company which is under provisional supervision. The SFC, being a non-government body, is bound by the moratorium under the bill.

28. However, there may be instances where, under the overriding principle of investor protection, the SFC may need to exercise its regulatory powers, for example, to conduct investigations or inspect documents of a company undergoing provisional supervision. Proceedings by the Insider Dealing Tribunal (IDT) should also be allowed to commence or continue in respect of a company undergoing rescue. Hence, we are proposing in the Bill to exempt from the moratorium IDT proceedings and the SFC in the exercise of its regulatory powers under the relevant provisions of the Securities and Futures Commission Ordinance (Cap. 24) and LFETO.

Recommendations of the Standing Committee on Company Law Reform to amend the Ordinance

29. The Bill has also incorporated various recommendations of the Standing Committee on Company Law Reform (SCCLR) to amend the Ordinance. Some of those recommendations have been set out in the Legislative Council brief on SCCLR Fifteenth Annual Report - 1998/99 dated 30 September 1999 (at Annex E). They are summarized below.

30. Section 194 of the Ordinance provides that the OR automatically becomes the provisional liquidator on the making of a winding up order by the Court. In order to reduce the caseload of his office arising from the increase in the number of compulsory winding up cases, the SCCLR has agreed to a proposal by the OR to amend section 194 to provide the OR with the authority to appoint directly a suitably qualified and experienced person to be the provisional liquidator of the company on the making of the winding up order, and thereafter the liquidator.

31. At present, the filing requirements in respect of the first annual return by private companies under sections 107 and 109 of the Ordinance

are cumbersome. To simplify such requirements, the SCCLR proposed that private companies would be required to file their first returns within 42 days after their first anniversaries of incorporation, regardless of when the companies held their first Annual General Meetings.

32. Section 116B of the Ordinance provides that a resolution in writing signed by all members is deemed to be a resolution having been passed at a duly convened general meeting. The SCCLR examined the general application of this provision with a view to removing existing conflicts with other provisions in the Ordinance and to facilitate the operations of smaller companies by reducing the number of formal meetings. Accordingly, the SCCLR has proposed to amend section 116B along the provisions of the UK Companies Act 1985 to enable a company to dispense with the holding of general meetings provided that unanimous written resolutions are used; the resolutions are signed by or on behalf of all members of the company; and a copy of the proposed written resolution is sent to the auditors of the company.

33. Section 228A of the Ordinance provides for the speedy appointment of a provisional liquidator by majority resolution of the directors of a company so that the company can be placed in voluntary winding up in an emergency situation. However, there have been continuous complaints that this procedure has been abused and creditors' interests have been adversely affected. As there are other means provided elsewhere in the Ordinance to initiate voluntary winding up and to appoint a provisional liquidator speedily, the SCCLR has proposed that the section be repealed and we agree accordingly.

34. The SCCLR has also proposed to lower the threshold for the requisition for convening an extraordinary meeting from the present requirement of members holding not less than one-tenth of the paid-up share capital to one-twentieth. This will facilitate the requisition of a meeting of the company by minority shareholders in particular and, as such, is in the interest of better corporate governance.

35. The Bill also provides the opportunity to rectify certain technical omissions and to streamline and update a number of provisions in the Ordinance.

THE BILL

36. Clauses 3, 7, 8, 9(b), 10, 11, 15 and 46 to 49 make technical amendments to a number of sections of the Ordinance to simplify and reduce the filing obligations for both local and oversea companies and their directors.

37. Clause 9(a) amends section 107 to simplify the filing requirement of the first annual return of a private company having a share capital. Under the simplified procedure, the date of filing of that return is no longer linked to the date of the company's first annual general meeting.

38. Clause 13 amends section 113 to lower the threshold for the voting rights/amount of paid up capital held by members permitted to requisition an extraordinary general meeting from one-tenth to one-twentieth.

39. Clause 14 implements the proposal on company resolution by unanimous written consent by repealing section 116B and replacing it by the new sections 116B, 116BA and 116BB. Exceptions to the use of unanimous written resolutions are the removal of directors or auditors from office before the expiry of their term of office because both have the right to make representations at a general meeting of a company. One further exception relates to the repurchase of shares from a shareholder by the company. The shareholder concerned is not allowed to vote on resolutions that are related to that repurchase.

40. Clause 24 adds the new Part IVB to give effect to the proposals on corporate rescue procedure. The new section 168V specifies the categories of companies to which corporate rescue shall/shall not apply. The new sections 168W and 168X empowers the Official Receiver to appoint a panel of professional accountants and solicitors eligible for appointment as provisional supervisors. The directors or a liquidator of the company may appoint a provisional supervisor under the new section 168Y.

41. The filing and notification requirements in respect of the notice of appointment of the provisional supervisor are set out in the new sections 168ZA to 168ZC. The Notice has to include a 'consent to act' form duly signed by the provisional supervisor. The form will be prescribed by the OR who will require, amongst other matters, the level of remuneration of the provisional supervisor to be displayed prominently in the consent form

for creditors to be so informed in the first instance. In addition, the Notice will require the company to confirm that it has set aside sufficient money to settle the statutory liabilities owed to its employees and former employees under the Employment Ordinance (Cap. 57) before the company goes into provisional supervision.

42. The effects of moratorium and the exemptions to it are set out in the new section 168ZD. The new section 168ZE provides for extensions to the moratorium subject to the sanction of the court. The duties and powers of the provisional supervisor are set out in the new sections 168ZF and 168ZG, and the new Eighteenth Schedule. Powers of directors are to be suspended under the new section 168ZI and the provisional supervisor will act as an agent of the company.

43. The new sections 168ZJ and 168ZK specify the liability of the provisional supervisor vis-à-vis contracts of goods and services and contracts of employment entered into before and after the rescue. Where the provisional supervisor accepts a pre-existing contract of employment, or enters into a new contract of employment, the wages and salaries thereby payable have priority over the provisional supervisor's remuneration. The provisional supervisor is indemnified out of the property of the company for all debts for which he is liable under the new section 168ZL.

44. Under the new section 168ZM, the provisional supervisor is remunerated in accordance with a scale of fees approved by the Official Receiver. The court, on the application of the provisional supervisor, may vary the scale. Creditors may also object if they consider the fees to be excessive.

45. The provisional supervisor is required to prepare a statement of affairs of the company as soon as practicable under the new section 168ZN. The procedures for the removal and resignation of the provisional supervisor are set out in the new section 168ZO.

46. The creation of 'super' priority debt is in the new section 168ZP. Borrowings made by the company in provisional supervision will receive priority over all existing debts, with the exception of fixed charges. This is necessary because in all likelihood, a company under rescue would need to raise capital to fund its operations during the provisional supervision period.

47. The new section 168ZQ sets out the procedures for major creditors of the company to decide whether or not the provisional supervisor may proceed to prepare the proposal. If a major creditor refuses, then the moratorium ceases and the provisional supervisor vacates his office. If the major creditors agree to the drawing up of a proposal but the proposal is eventually rejected by the creditors, the company may either be wound up as a creditors' voluntary winding-up, or if it was previously under court winding-up procedures, the stayed procedures would be re-activated.

48. The requirements and procedures for the creditors' meetings to consider the proposal by the provisional supervisor are in the new sections 168ZR to 168ZT. Where the proposal is accepted by the creditors, a voluntary arrangement will follow and the procedures for such an arrangement are in the new sections 168ZU to 168ZY.

49. Clause 44 adds new sections 295A to 295G to implement the proposals on insolvent trading. Section 295B empowers the liquidator of a company to make an application to the court to seek declaration that a "responsible person", i.e. a director or a member of senior management, is liable for insolvent trading. Grounds on which the court may declare a responsible person liable for insolvent trading are set out in the new section 295C. The new section 295E provides that where the court makes a declaration of insolvent trading in respect of a responsible person or former responsible person, it may order that person to pay compensation to the company.

50. Clauses 30 amends section 194 to give the Official Receiver, where he is the provisional liquidator of a company, the authority to appoint a person as provisional liquidator in his place in summary winding-up cases where the Official Receiver is of the opinion that the assets of the company is unlikely to exceed $200,000. This will facilitate the Official Receiver to contract out summary compulsory winding-up cases.

51. Clause 23 amends section 168R to enable the Registrar of Companies to maintain a complete set of company director disqualification orders. The present provisions do not provide for filing of disqualification orders handed down by the IDT under the Securities (Insider Dealing) Ordinance (SIDO) to the R of C. This clause seeks to rectify the situation.

52. Clause 20 introduces a new section 168IA to remove the

deficiency in section 222 by allowing the Official Receiver to conduct public examination in court of a director of a company which has been wound up by the court when there is a prima facie case for the application for a disqualification order under Part IVA of the Ordinance.

53. Clause 42 seeks to rectify an anomaly in section 264A by making it clear that interest on the taxed costs of a petition for winding up is payable in accordance with that section as with interest on other proved debts, and not with the same priority as the taxed costs of the petition itself.

54. Clause 46 amends section 333 so that, apart from individuals or partnerships of accountants or solicitors, incorporated firms of accountants or solicitors can also accept process on behalf of oversea companies. This is to rectify a technical omission in relation to the amendments made to the Ordinance and the Professional Accountants Ordinance in 1995 to provide for incorporation of professional accountant firms.

55. Clause 50 amends section 345 so that firms of certified public accountants or public accountants having over 20 partners can admit non-practising-certificate holders as partners. This consequential amendment was omitted when the Professional Accountants Ordinance (Amendment) Ordinance 1994 was introduced to relax the requirement on partners being holders of practising certificates.

56. The other clauses seek to make technical, textual or consequential amendments to the Ordinance.

LEGISLATIVE TIMETABLE

57. The legislative timetable is as follows -

Publication in the Gazette	7 January 2000
First Reading and Commencement of Second Reading debate	19 January 2000
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

HUMAN RIGHTS IMPLICATIONS

58. The Department of Justice advises that the Bill is consistent with the human rights provisions in the Basic Law.

BASIC LAW IMPLICATIONS

59. The Department of Justice advises that the Bill is consistent with those provisions of the Basic Law carrying no human rights dimensions.

BINDING EFFECT OF THE LEGISLATION

60. Individuals and organizations, including the HKSAR Government will be subject to the application of the moratorium when they are acting in the capacity as creditors of the company.

FINANCIAL AND STAFFING IMPLICATIONS

61. With the introduction of the new statutory corporate rescue procedure, the ORO will need to maintain a panel of provisional supervisors which may generate additional workload to the department. Any additional resources required will be absorbed by the ORO through internal re-deployment and from within the global allocation of the Secretary for Financial Services. Other proposals in the Bill have no financial or staffing implications for Government.

ECONOMIC IMPLICATIONS

62. The corporate rescue procedure would help financially ailing but potentially viable business as to survive as a going concern, in whole or in part. It would be beneficial to the company's shareholders and creditors who might in due course get a better return from the success of the rescue than from the outcome of a winding-up. The procedure will be particularly helpful in reducing the stress to the economy when a greater number of companies with viable business for the longer term face more

immediate, but relatively short term, financial difficulties in a cyclical economic downturn.

63. The improvements made to the various provisions of the Ordinance under the Bill will make our company law more business-friendly and thus enhance Hong Kong's position as a commercial and financial centre in the region.

PUBLIC CONSULTATION

64. The LRC Sub-Committee on Insolvency carried out a public consultation on the concept of corporate rescue in 1995. A consultation exercise on certain proposals of the LRC was conducted by the Financial Services Bureau in 1998 with 26 major business/professional and employer/employee bodies. The consultation exercise and the results were reported on two occasions to the Financial Affairs Panel of the Legislative Council in February and June 1999 respectively. The SCCLR expressed support for the introduction of a statutory corporate rescue at one of its meetings in 1996. Subsequently, at the meeting on 14 December 1999, the SCCLR examined the draft provisions on corporate rescue and insolvent trading. Concern was expressed over a possible conflict of interest that might arise if a provisional supervisor is allowed to become the liquidator of the company should creditors resolve to wind up that company. However, we believe that it makes commercial sense to leave the choice of liquidator to the creditors themselves if they consider that the provisional supervisor is the most appropriate person to become the liquidator of the company in the circumstances. A provisional supervisor turned liquidator would save time and money as he would by then have grasped a fair amount of knowledge of the affairs of the company to quickly proceed with the winding up.

65. All the other recommendations outlined in paragraphs 30 to 34 above have been discussed and supported by the SCCLR.

PUBLICITY

66. A press release will be issued on 6 January 2000 and a spokesman will be available to handle media enquiries.

ENQUIRIES

67. For enquiries, please call Mr L W TING, Assistant Secretary for Financial Services (Companies) at 2528 9077.

Financial Services Bureau
Ref : FSB C2/1/12C(99)IX

Annex A

COMPANIES (AMENDMENT) BILL 2000

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A BILL

To

Amend the Companies Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Companies (Amendment) Ordinance 2000.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Financial Services by notice in the Gazette.

2. Interpretation

Section 2 of the Companies Ordinance (Cap. 32) is amended -

(a) in subsection (1), by adding -

""liquidator"（清盤人）includes a provisional liquidator holding such office by virtue of section 194;";

(b) by adding -

"(10) In this Ordinance, unless the context otherwise requires, the terms "former provisional supervisor"（前任臨時監管人）, "former supervisor"（前任監管人）, "provisional supervisor"（臨時監管人）, "supervisor"（監管人）and "voluntary arrangement"（自願償債安排）have the

meanings respectively assigned to them in section 168U.

(11) In this Ordinance, unless the context otherwise requires, the terms "former responsible person"（前任負責人）, "insolvent trading"（在無力償債情況下營商）and "responsible person"（負責人）have the meanings respectively assigned to them in section 295A.".

3. **Power to dispense with certain words in name of charitable and other companies**

Section 21(6)(a) is repealed.

4. **Relaxation of section 47A for unlisted companies**

Section 47E is amended by adding -

"(7) In relation to a resolution agreed to, or proposed to be agreed to, in accordance with section 116B giving approval under subsection (4) or (5), section 47G(11)(a) shall not apply, but the declaration referred to in section 47E(6) shall be supplied -

(a) to each member by whom, or on whose behalf, the resolution is required to be signed in accordance with section 116B; and

(b) at or before the time at which the resolution is supplied to the member for signature.

[*cf. 1985 c. 6 Sch. 15A, Pt. II, item 4 U.K.*]".

5. Authority for purchase by unlisted company

Section 49D is amended by adding -

"(7) In relation to a resolution agreed to, or proposed to be agreed to, in accordance with section 116B -

(a) conferring authority to make a purchase of the company's shares under subsection (2);

(b) varying, revoking or renewing an authority under subsection (3); or

(c) conferring authority to vary a contract for a purchase of the company's shares under subsection (6),

then -

(i) subsection (4) shall not apply but, for the purposes of section 116B(1), a member holding shares to which the resolution relates shall not be regarded as a member who would be entitled to attend and vote;

(ii) subsection (5) shall not apply but the documents referred to in that subsection and, where that subsection applies by virtue of subsection (6), the further documents referred to in subsection (6), shall be supplied -

(A) to each member by whom, or on whose behalf, the resolution is required to be signed in accordance with section 116B; and

(B) at or before the time at which the resolution is supplied to the member for signature.

(8) Subsection (7) shall also have effect in relation to a resolution agreed to, or proposed to be agreed to, in accordance with section 116B in relation to which the provisions of subsections (3) to (6) apply by virtue of section 49E(3) or 49F(2).

[*cf. 1985 c. 6 Sch. 15A, Pt. II, item 5, U.K.*]".

6. Conditions for payment out of capital

Section 49K is amended by adding -

"(7) In relation to a resolution agreed to, or proposed to be agreed to, in accordance with section 116B giving approval under subsection (2), then -

(a) section 49L(2) shall not apply but, for the purposes of section 116B(1), a member holding shares to which the resolution relates shall not be regarded as a member who would be entitled to attend and vote;

(b) section 49L(4) shall not apply but the documents referred to in that section shall be supplied -

(i) to each member by whom, or on whose behalf, the resolution is required to be signed in accordance with section 116B; and

(ii) at or before the time at which the resolution is supplied to the member for signature.

[*cf. 1985 c. 6 Sch. 15A, Pt. II, item 6, U.K.*]".

7. **Approval of company required for allotment of shares by directors**

Section 57B(5) is repealed.

8. **Documents relating to rights of holders of special classes of shares to be filed with Registrar**

Section 64A(b) and (c) is repealed.

9. Annual return to be made by company

Section 107 is amended -

(a) by repealing subsection (3) and substituting -

"(3) A company (not being a private company having a share capital) need not make a return under subsection (1) in the year of its incorporation or, if it is not required by section 111 to hold an annual general meeting during the following year, in that year.

(3A) A private company having a share capital need not make a return under subsection (1) in the year of its incorporation.

(3B) A private company having a share capital which was incorporated in any of the

months from July to December inclusive in the year immediately preceding the year in which section 9 of the Companies (Amendment) Ordinance (of 2000) commenced need not make a return under subsection (1) in the year immediately following the year of its incorporation.";

(b) in subsection (5), by repealing "director and" and substituting "director or".

10. General provisions as to annual returns

Section 109 is amended -

(a) in subsection (1), by repealing "both by a director and" and substituting "by a director or";

(b) in subsection (1A) -

(i) by repealing ", subject to subsection (1B),";

(ii) by repealing "both by a director and" and substituting "by a director or";

(c) by repealing subsection (1B).

11. **Certificates to be sent by private company with annual return**

Section 110 is amended by repealing "director and" and substituting "director or".

12. Annual general meeting

Section 111 is amended by adding -

"(6) A company is not required to hold a meeting in accordance with subsection (1) if -

(a) everything that is required or intended to be done at the meeting (by resolution or otherwise) is done by a resolution or resolutions in accordance with section 116B; and

(b) a copy of each document (including any accounts or records) which under this Ordinance would be required to be laid before the company at the meeting or otherwise produced at the meeting is provided to each member of the company -

(i) by whom or on whose behalf the resolution or resolutions, as the case may be, is or are required to be signed under that section; and

(ii) before or at the same time as the resolution or resolutions, as the case may be, is or are provided to the member.".

12. **Convening of extraordinary general meeting on requisition**

Section 113(1) is amended by repealing "one-tenth" where it twice appears and substituting "one-twentieth".

14. Section substituted

Section 116B is repealed and the following substituted -

"116B. Written resolutions of companies

(1) Anything which in the case of a company may be done -

(a) by resolution of the company in general meeting; or

(b) by resolution of a meeting of any class of members of the company,

may be done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting.

(2) The signatures need not be on a single document provided each is on a document which accurately states the terms of the resolution.

(3) The date of the resolution means when the resolution is signed by or on behalf of the last member to sign.

(4) A resolution agreed to in accordance with this section has effect as if passed -

(a) by the company in general meeting; or

(b) by a meeting of the relevant class of members of the company,

as the case may be; and any reference in any enactment to a meeting at which a resolution is passed or to members voting in favour of a resolution shall be construed accordingly.

(5) Any reference in any enactment to -

(a) the date of passing of a resolution is, in relation to a resolution agreed to in accordance with this section, a reference to the date of the resolution;

(b) the date of a meeting is, in relation to a resolution agreed to in accordance with this section without the meeting, a reference to the date of the resolution.

(6) A resolution may be agreed to in accordance with this section which would otherwise be required to be passed as a special resolution; and any reference in any enactment to a special resolution includes such a resolution.

(7) This section shall not apply to -

(a) a resolution under section 131 removing an auditor before the expiration of his term of office;

(b) a resolution under section 157B removing a director before the expiration of his period of office.

[*cf. 1985 c. 6 s. 381A U.K.*]

116BA. Duty to notify auditors of proposed written resolution

(1) If a director or secretary of a company -

(a) knows that it is proposed to seek agreement to a resolution in accordance with section 116B; and

(b) knows the terms of the resolution,

he shall, if the company has auditors, secure that a copy of the resolution is sent to them, or that they are otherwise notified of its contents, at or before the time the resolution is supplied to a member for signature.

(2) A director or secretary who fails to comply with subsection (1) shall be liable to a fine.

(3) In any proceedings for an offence under this section it is a defence for the defendant to prove -

(a) that the circumstances were such that it was not practicable for him to comply with subsection (1); or

(b) that he believed on reasonable grounds that a copy of the resolution had been sent to the company's auditors or that they had otherwise been informed of its contents.

(4) Nothing in this section affects the validity of any resolution.

[*cf. 1985 c. 6 s. 381B U.K.*]

116BB. Written resolutions: supplementary provisions

(1) Sections 116B and 116BA shall have effect notwithstanding any provision of the company's memorandum or articles, but do not prejudice any power conferred by any such provision.

(2) Nothing in sections 116B and 116BA shall affect any enactment or rule of law as to -

(a) things done otherwise than by passing a resolution; or

(b) cases in which a resolution is treated as having been passed, or a person is precluded from alleging that a resolution has not been duly passed.

[*cf. 1985 c. 6 s. 381C U.K.*]".

15. Resignation of director or secretary

Section 157D is amended -

(a) in subsection (2), by repealing ", subject to subsection (3)(c),";

(b) by repealing subsection (3)(b) and (c).

16. Disqualification orders: general

Section 168D(1) is amended by adding -

"(ab) be the provisional supervisor of a company;

(ac) be the supervisor of a voluntary arrangement in respect of a company;".

17. Disqualification for fraud, etc., in winding up

Section 168G(1)(b) is repealed and the following substituted -

"(b) has otherwise been guilty, while an officer, provisional supervisor or liquidator of the company, or the supervisor of a voluntary arrangement in respect of the company or receiver or manager of its property, of any fraud in relation to the company or of any breach of his

duty as such officer, provisional supervisor, liquidator, supervisor, receiver or manager.".

18. Duty of court to disqualify unfit directors of insolvent companies

Section 168H(2)(b) is amended by adding "provisional supervisor or" after "a".

19. Applications to court under section 168H: reporting provisions

Section 168I is amended -

(a) in subsection (1) -

(i) in paragraph (a), by repealing "in any case";

(ii) in paragraph (b), by repealing "in the case of a person who is or has been a director of a company that is being wound up";

(b) in subsection (2) -

(i) in paragraph (a), by repealing ", 228A";

(ii) by repealing paragraph (b) and substituting -

"(b) in respect of which a provisional supervisor has been appointed or that goes into receivership, with the day on which the provisional supervisor or receiver, as the

case may be, vacated his office.";

(c) in subsection (3) -

(i) by adding before paragraph (a) -

"(aa) the provisional supervisor of a company;

(ab) the supervisor of a voluntary arrangement in respect of a company;";

(ii) by repealing ", or in cases not involving the winding up of the company shall,";

(d) in subsection (4), by repealing "liquidator or receiver of a company, or the former liquidator or receiver of a company" and substituting "provisional supervisor, liquidator or receiver of a company, the supervisor of a voluntary arrangement in respect of a company, or the former provisional supervisor, liquidator or receiver of a company, or the former supervisor of a voluntary arrangement in respect of a company".

20. Section added

The following is added -

"168IA. Power to order public examination

(1) The court may, on the application of the Official Receiver by a report stating that in his opinion a prima facie case exists against any person that would render him liable to a disqualification order under this Part, direct

that the person shall attend before the court on a day appointed by the court for that purpose and be publicly examined as to the conduct of the business of a company or as to his conduct and dealings as a director.

(2) The court may require a person referred to in subsection (1) to submit an affidavit to the court containing an account of the conduct of the business of the company or his conduct and dealings as a director of the company, or to produce any documents in his possession or under his control relating to the conduct of the business of the company or his conduct and dealings as a director of the company.

(3) Where an application has been made under subsection (1), the court may require any person, other than a person referred to in subsection (1), whom the court deems capable of giving information concerning the conduct of the business of the company concerned or as to the conduct and dealings of directors of the company to produce any documents in his possession or under his control relating to the conduct of the business of the company or as to the conduct and dealings of directors of the company.

(4) The Official Receiver shall take part in the examination, and for that purpose may employ a solicitor with or without counsel.

(5) The court may put such questions to the person examined as the court thinks fit.

(6) The person examined shall be examined on oath, and shall answer all such questions as the court may put or allow to be put to him.

(7) A person ordered to be examined under this section shall, before his examination, be furnished with a copy of the Official Receiver's report, and may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to him such questions as the court may deem just for the purpose of enabling him to explain or qualify any answers given by him.

(8) There shall be made in writing such record of examination as the court thinks proper and the record shall be read over to or by the person examined, signed by him, and verified by affidavit at a venue fixed by the court.

(9) The verified notes of the examination of each person who was examined shall, subject to any order or direction of the court as to the manner and extent in and to which the notes shall be used, be admissible in evidence against any person against whom an order for examination has been made in any proceedings under this Part.".

21. Fraudulent trading, etc.

Section 168L(1) is amended by adding "or a declaration under section 295C(1) that a person is liable for insolvent trading," after "company,".

22. **Personal liability for company's debts**

where person acts while disqualified

Section 1680 is amended -

(a) by adding -

"(1A) A person is personally responsible for all the debts of a company if -

(a) at any time in contravention of a disqualification order or of section 156 he is involved in the management of the company;

(b) a declaration under section 295C(1) is made that the person is liable for insolvent trading in respect of the company; and

(c) that insolvent trading occurred (whether in whole or in part) during the time referred to in paragraph (a).";

(b) in subsection (2), by adding "or all the debts" after "relevant debts".

23. Register of disqualification orders

Section 168R is amended by adding -

"(5) For the purposes of this section -

"court"（法院）includes a magistrate and the Tribunal within the meaning of section 2 of the Securities (Insider Dealing) Ordinance (Cap. 395);

"disqualification order"（取消資格令）means an order of the court under -

(a) section 168E, 168F, 168G, 168H, 168J or 168L; or

(b) section 23(1)(a) or 24(1) of the Securities (Insider Dealing) Ordinance (Cap. 395).".

24. Part added

The following is added -

"PART IVB

PROVISIONAL SUPERVISION AND VOLUNTARY ARRANGEMENTS

168U. Interpretation

(1) In this Part, unless the context otherwise requires -

"approved scale of fees"（核准收費表）means the scale of fees approved under section 168ZM(1);

"costs"（費用）include expenses;

"former provisional supervisor"（前任臨時監管人）, in relation to a company, means a person who was formerly a provisional supervisor of the company;

"former supervisor"（前任監管人）, in relation to a company, means a person who was formerly the supervisor of a voluntary arrangement in respect of the company;

"High Court Registry"（高等法院登記處）means any Registry of the High Court;

"Hong Kong Society of Accountants"（香港會計師公會）means the Hong Kong Society of Accountants incorporated by section 3 of the Professional Accountants Ordinance (Cap. 50);

"moratorium"（暫止期）, in relation to a company, means the period during which the provisions of section 168ZD(3) apply to and in relation to the company by virtue of section 168ZD(1);

"panel"（備選團）means the panel appointed under section 168W(1);

"practicable"（切實可行）means reasonably practicable;

"professional accountant"（專業會計師）means a professional accountant within the meaning of section 2 of the Professional Accountants Ordinance (Cap. 50);

"property"（財產）includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;

"proposal"（方案）means a proposal referred to in section 168Z(1);

"provisional supervisor"（臨時監管人）, in relation to a company, means the qualified person appointed under section 168Y(1) or 168ZO(4)(ii) to be the provisional supervisor of the company;

"qualified person"（合資格人士）, in relation to a company, means a person who may be appointed to be the provisional supervisor of the company by virtue of section 168X;

"relevant creditor"（有關債權人）, in relation to a company to which section 168ZD (3) applies, means a creditor of the company who is affected by the moratorium in his capacity as such a creditor;

"relevant date"（有關日期）, in relation to a company, means the date on which the last document required to be filed under section 168ZA in respect of the company is filed;

"relevant meeting of creditors"（有關債權人會議）, in relation to a company, means a meeting of relevant creditors of the company called under section 168ZR(1) by the provisional supervisor of the company, and includes any adjournment thereof;

"relevant purpose"（有關目的）means a purpose specified in section 168Z(1);

"solicitor"（律師）means a solicitor within the meaning of section 2(1) of the Legal Practitioners Ordinance (Cap. 159);

"specified"（指明）, in relation to a form, means specified under section 168ZZ (or, if no such form is so specified, in such form as is appropriate for the provision of this Part to which the form relates);

"supervisor"（監管人）, in relation to a voluntary arrangement in respect of a company, means the person appointed under that arrangement to be the supervisor thereof;

"voluntary arrangement"（自願償債安排）, in relation to a company, means an arrangement set out in writing and providing for -

(a) either -

(i) a composition in satisfaction of the company's debts; or

(ii) a scheme of arrangement of the company's affairs;

(b) a supervisor of the arrangement;

(c) the removal and resignation of the supervisor and his replacement in the event of his removal or resignation, or of his death, mental incapacity or ineligibility to act as the supervisor; and

(d) the events the occurrence of which shall cause the arrangement to cease to have effect;

"working day"（工作天）means any day other than -

(a) a public holiday; or

(b) a black rainstorm warning day or a gale warning day within the meaning of section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

(2) It is hereby declared that the power under section 168Y(1) or 168ZO(4) (ii) to appoint a qualified person as the provisional supervisor of a company may be exercised in such a way as to appoint 2 or more qualified persons to be the provisional supervisor of the company and, in any such case, the provisions of this Ordinance shall be read and have

effect with such modifications as are necessary to take into account such an appointment.

(3) Subsection (2) shall, with all necessary modifications, apply to the appointment of the supervisor of a voluntary arrangement in respect of a company as it applies to the appointment of the provisional supervisor of a company.

168V. Application

(1) This Part shall -

(a) subject to paragraph (b), apply to a company which -

(i) is incorporated under Part I;

(ii) is an oversea company; or

(iii) belongs to a class of companies declared in a notice under subsection (2)(a) to be a class of companies to which this Part shall apply;

(b) subject to section 168ZD(10), not apply to a company which -

(i) is an authorized institution within the meaning of the Banking Ordinance (Cap. 155);

(ii) is an authorized insurer within the meaning of the Insurance Companies Ordinance (Cap. 41);

(iii) is a clearing house, Exchange Company or registered person within the meaning of section 2(1) of the Securities and Futures Commission Ordinance (Cap. 24);

(iv) is a licensed leveraged foreign exchange trader within the meaning of section 2(1) of the Leveraged Foreign Exchange Trading Ordinance (Cap. 451);

(v) belongs to a class of companies declared in a notice under subsection (2)(b) to be a class of companies to which this Part shall not apply.

(2) The Secretary for Financial Services may, by notice in the Gazette, declare a class of companies specified in the notice to be -

(a) a class of companies to which this Part shall apply;

(b) a class of companies to which this Part shall not apply.

(3) It is hereby declared that a notice under subsection (2) is subsidiary legislation.

168W. Appointment of panel, etc.

(1) The Official Receiver shall appoint to be a member of a panel any person who -

(a) is a professional accountant or solicitor;

(b) advises the Official Receiver in writing that he wishes to be a member of the panel; and

(c) satisfies the Official Receiver that he complies with such requirements as are specified by the Official Receiver, by notice in the Gazette, for membership of the panel.

(2) Without prejudice to the operation of section 168ZO (including section 168ZO(2)), a member of the panel may resign at any time by notice in writing given to the Official Receiver.

(3) The Official Receiver shall revoke the appointment of a member of the panel who -

(a) ceases to be a professional accountant or solicitor;

(b) is the subject of a bankruptcy order;

(c) is the subject of a disqualification order under Part IVA; or

(d) is a patient within the meaning of section 2(1) of the Mental Health Ordinance (Cap. 136).

(4) Any professional accountant or solicitor aggrieved by a decision of the Official Receiver to refuse to appoint him to be a member of the panel may appeal to the Administrative Appeals Board against the decision.

(5) It is hereby declared that a notice under subsection (1)(c) is not subsidiary legislation.

168X. Persons qualified to be provisional supervisor of company

No person shall be appointed to be the provisional supervisor of a company -

(a) except -

(i) a member of the panel; or

(ii) a person in respect of whom the Official Receiver has stated in writing that he is satisfied that the person -

(A) has particular skills which warrant him being appointed to be the provisional supervisor of the company; and

(B) is a fit and proper person to be so appointed; and

(b) unless he provides such security, and in such form, as is prescribed in regulations made under section 168ZZA.

168Y. Persons who may appoint provisional supervisor of company

(1) Subject to sections 168Z and 168ZA, the persons who may appoint a qualified person to be the provisional supervisor of the company for the purpose of the provisional supervisor examining whether a proposal can be made to the creditors of the company for a voluntary arrangement in respect of the company and, if so, making the proposal are -

(a) before the commencement of a winding up -

(i) the directors of the company by means of a resolution passed by the majority of them for the purpose; or

(ii) the members of the company by means of an ordinary resolution passed at a meeting of the company convened for the purpose;

(b) a provisional liquidator of the company who has the approval of the court to do so;

(c) the liquidator of the company who has the approval of the court to do so.

(2) It is hereby declared that the appointment of a qualified person to be the provisional supervisor of the company may be made -

(a) whether or not the company is able to pay its debts;

(b) notwithstanding that the qualified person is -

(i) the provisional liquidator or liquidator of the company; or

(ii) a partner of that provisional liquidator or liquidator.

(3) In subsection (2), "partner"（合夥人）, in relation to a provisional liquidator or liquidator, includes a person recognized in writing by the Official Receiver as being equivalent to a partner of the provisional liquidator or liquidator, as the case may be.

168Z. Purposes of proposal, etc.

(1) The persons referred to in section 168Y(1) shall not appoint a qualified person to be the provisional supervisor of the company unless they are satisfied that there is a reasonable likelihood that the qualified person, if so appointed, could make a proposal which would achieve one or more of the following purposes -

(a) a more advantageous realization of the company's property than would be effected on a winding up of the company;

(b) the survival of the company, and the whole or any part of its undertaking, as a going concern;

(c) the more advantageous satisfaction, in whole or in part, of the debts and other liabilities of the company;

(d) a purpose declared in a notice under subsection (2) to be a purpose to which this subsection shall apply.

(2) The Secretary for Financial Services may, by notice in the Gazette, and subject to such conditions, if any, as are specified in the notice, declare a purpose specified in the notice to be a purpose to which subsection (1) shall apply.

(3) It is hereby declared that a notice under subsection (2) is subsidiary legislation.

168ZA. Filing of documents

The appointment of a qualified person to be the provisional supervisor of the company shall not come into effect unless and until the following documents are filed with the Official Receiver, the Registrar and the High Court Registry -

(a) a notice of -

(i) the resolution -

(A) in the specified form;

(B) of the directors or members of the company; and

(C) providing for the appointment; or

(ii) the appointment -

(A) in the specified form; and

(B) signed by the provisional liquidator or liquidator, if any, of the company;

(b) a notice in the specified form of the consent of the qualified person to the appointment signed by the qualified person; and

(c) a notice in the specified form of an affidavit -

(i) where the appointment is made by virtue of section 168Y(1)(a)(i), of the directors of the company or, in the case of a company having more

than 2 directors, of the majority of them;

(ii) where the appointment is made by virtue of section 168Y(1)(a)(ii), of not less than 3 members of the company or, in the case of a company with only 2 members, of both those members;

(iii) setting out the reasons for the appointment; and

(iv) stating that the company -

(A) has a trust account -

(I) with an authorized institution within the meaning of the Banking Ordinance (Cap. 155);

(II) the exclusive purpose of which is to provide money to pay all debts and liabilities owing, by virtue of the Employment Ordinance (Cap. 57), by the company to its employees and former

employees before the relevant date; and

(III) containing sufficient money to pay all those debts and liabilities; or

(B) has paid all debts and liabilities, or has no debts and liabilities, owing, by virtue of the Employment Ordinance (Cap. 57), to its employees and former employees before the relevant date.

168ZB. Notice in Gazette

The provisional supervisor of the company shall, as soon as is practicable after the relevant date, cause a notice in the specified form to be published -

(a) in the Gazette and in -

(i) 1 English language newspaper circulating generally in Hong Kong; and

(ii) 1 Chinese language newspaper circulating generally in Hong Kong; and

(b) containing a statement to the effect that he has been appointed to be the provisional supervisor of the company for the purposes of

examining whether a proposal can be made to the creditors of the company for a voluntary arrangement in respect of the company and, if so, making the proposal.

168ZC. Notice to creditors

(1) The provisional supervisor of the company shall, as soon as is practicable after the relevant date, cause a notice in the specified form to be published -

(a) in -

(i) 1 English language newspaper circulating generally in Hong Kong; and

(ii) 1 Chinese language newspaper circulating generally in Hong Kong; and

(b) advising creditors of the company to give notice in writing -

(i) to the provisional supervisor at the address specified in the notice;

(ii) of their claims against the company; and

(iii) not later than 7 days after the date on which the newspaper is published.

(2) For the avoidance of doubt, it is hereby declared that a notice under section 168ZB may be combined with a notice under this section.

168ZD. Moratorium

(1) Subject to subsections (2), (7), (8) and (9), the provisions of subsection (3) shall apply to and in relation to the company with effect on and after the relevant date.

(2) Subject to subsection (7) and sections 168ZE(3), 168ZQ(2) and 168ZT(20)(c), the moratorium shall cease upon the expiration of 30 days immediately following the relevant date unless -

(a) the moratorium has been extended under section 168ZE(2); or

(b) a resolution to extend the moratorium has been passed under section 168ZS at a relevant meeting of creditors.

(3) Subject to subsection (4), during the moratorium and notwithstanding any other law (including any other provision of this Ordinance) -

(a) no application for the winding up of the company by the court may be commenced or continued;

(b) no resolution may be passed for the winding up of the company except at a relevant meeting of creditors;

(c) no receiver of the property of the company may be appointed or, if such a receiver has already been appointed, the receiver shall not exercise any of the powers of his office;

(d) except with the consent of the provisional supervisor of the company, no steps may be

taken to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession;

(e) except with the consent of the provisional supervisor of the company, no proceedings (including proceedings for winding up but excluding any criminal proceedings), execution, attachment or other legal process may be commenced or continued against the company or its property, no distress may be levied (or, if distress has already been levied, no sale thereunder may be effected) and no right of forfeiture or entry or reentry may be exercised against the company's property;

(f) no set-off may be allowed to any creditor of the company except with the consent of the provisional supervisor of the company or in relation to a contract or other agreement referred to in subsection (4)(d).

(4) Subsection (3) shall not apply to or in relation to -

(a) any debt or other liability of the company incurred on or after the relevant date (including any creditor in respect thereof);

(b) any property held by the company as trustee;

(c) any resumptions by the Government pursuant to a Government lease or otherwise;

(d) a contract or other agreement specified in the Seventeenth Schedule;

(e) any proceedings or other legal process in relation to the company arising from the performance of any function or the exercise of any power under section 29A, 30, 31, 33, 37A or 45 of the Securities and Futures Commission Ordinance (Cap. 24);

(f) an inquiry or other proceedings under the Securities (Insider Dealing) Ordinance (Cap. 395);

(g) a petition under section 168A.

(5) Where -

(a) a matter (howsoever described, and including the doing of any act and the taking of any step) may not proceed by virtue of the operation of subsection (3) (and whether or not the matter may not proceed on any other ground); and

(b) a period is fixed by or under any law or otherwise for the matter to proceed,

then, and notwithstanding howsoever that period is fixed, that period shall not run during the time that that matter may not proceed by virtue of the operation of that subsection.

(6) Where a contract or other agreement referred to in subsection (4)(d) entered into by the company before the relevant date is terminated on or after that date -

(a) the setting-off of obligations between the company and the other parties to the contract or agreement, in accordance with its provisions, shall be permitted; and

(b) if net termination values determined in accordance with the contract or agreement are owed by the company to another party to the contract or agreement, that other party shall be deemed for the purpose of this Part and, where applicable, any subsequent winding up of the company to be a creditor of the company with a claim provable in respect of those net termination values.

(7) The moratorium shall cease forthwith on the day -

(a) an order or appointment is made under section 168A(2)(b), (ba) or (c) in respect of the company;

(b) an order or appointment is made under section 37A(2)(b), (c) or (d), or a winding up order is made in consequence of a petition under section 45(1), of the Securities and Futures Commission Ordinance (Cap. 24) in respect of the company; or

(c) a resolution under section 168ZS(1)(a)(ii), (2)(b) or (4)(b) is passed in relation to the company.

(8) Without prejudice to the operation of subsection (7) or section 168ZO(4)(iii), 168ZQ(2) or 168ZT(20)(c), the

moratorium shall cease forthwith where a resolution is passed to approve the proposal, or a resolution is passed or deemed to be passed to wind up the company, or a resolution is passed to reject the proposal concerned, at a relevant meeting of creditors.

(9) Subsection (3) shall cease to apply -

(a) to 1 or more creditors of the company who have been excluded from the proposal by the provisional supervisor of the company at any time prior to the first relevant meeting of creditors if, but only if, the provisional supervisor -

(i) has made alternative arrangements in writing to satisfy their claims (whether in whole or in part) against the company; and

(ii) has filed a notice in the specified form of such exclusion with the Official Receiver, the Registrar and the High Court Registry; and

(b) to any creditor exempted from that subsection pursuant to an order under section 168ZE(4).

(10) Without prejudice to the operation of subsection (4), it is hereby declared that the provisions of this Part bind the Government in its capacity, if any, as a creditor of the company.

(11) Where the provisional supervisor of the company is appointed, then, and notwithstanding any other law (including

any other provision of this Ordinance) but subject to subsection (13) and sections 168ZQ(2)(b) and 168ZS(6), the appointment of the provisional liquidator or liquidator, if any, of the company in force immediately before the relevant date shall terminate, and the winding up proceedings of the company shall be stayed, with effect on the relevant date.

(12) Subsection (11) shall not of itself operate to prevent a person whose appointment as the provisional liquidator or liquidator of the company has been terminated by that subsection from being appointed as the supervisor of the voluntary arrangement in respect of the company.

(13) It is hereby declared that -

(a) the operation of this section (including subsection (11)) in relation to a company shall not of itself terminate any proceedings for the winding up of the company commenced before the relevant date and, accordingly, a resolution referred to in section 168ZS(1)(a)(ii), (2)(b) or (4)(b) shall in effect revive such proceedings;

(b) any fees, costs and charges owing to or incurred by the provisional liquidator or liquidator whose appointment is terminated by virtue of subsection (11) shall be charged on and paid out of the property of the company in priority to any qualifying liabilities under section 168ZK.

(14) The Secretary for Financial Services may, by notice in the Gazette, amend the Seventeenth Schedule.

(15) In this section -

"net termination value"(淨終止值), in relation to a contract or agreement, means the net amount obtained after setting-off the mutual obligations between the parties to the contract or agreement in accordance with its provisions.

168ZE. Extension of moratorium, etc.

(1) Where the provisional supervisor of the company is unable to complete the proposal before the expiration of the moratorium (including the moratorium as extended under this section), then he may, before that expiration, make an application to the court for an extension of the moratorium.

(2) Subject to subsection (5), the court may determine an application made under subsection (1) by granting an extension of the moratorium for a further period if, but only if, it is satisfied that -

(a) the provisional supervisor of the company is and has been acting in good faith and with due diligence in discharging his duties and exercising his powers as the provisional supervisor;

(b) the provisional supervisor will be likely to complete the proposal within the period of the extension; and

(c) the creditors as a whole of the company would not be materially prejudiced by the extension.

(3) Where an application has been made under subsection (1) in respect of the company, the moratorium shall not cease before the determination of the application.

(4) Without prejudice to the operation of the other provisions of this section, any creditor affected by the moratorium may make an application to the court (a copy of which shall be served on the provisional supervisor of the company) to be exempted from the application of section 168ZD(3) on the ground that the moratorium is causing, or will cause, the creditor significant financial hardship and, accordingly, if the court is satisfied that the moratorium is causing, or will cause, the creditor significant financial hardship, it may by order exempt the creditor from the application of section 168ZD(3) or make such other order as the court thinks fit in all the circumstances of the case.

(5) Subject to section 168ZT(20)(c), the court shall not under subsection (2) extend the moratorium for any period beyond the period of 6 months immediately following the relevant date in respect of the company.

168ZF. Duties of provisional supervisor, etc.

(1) The provisional supervisor of the company shall have, and shall discharge, in respect of the company, all the duties specified in Part 1 of the Eighteenth Schedule.

(2) The provisional supervisor of the company shall be personally liable on any contract entered into by the

provisional supervisor in the discharge of his duties or the exercise of his powers as the provisional supervisor except in so far as the contract otherwise provides.

168ZG. Powers of provisional supervisor

(1) The provisional supervisor of the company shall have, and may exercise, in respect of the company, all the powers specified in Part 2 of the Eighteenth Schedule.

(2) The provisional supervisor of the company may -

(a) remove any director or officer of the company; or

(b) appoint any director or officer of the company, whether to fill a vacancy or otherwise.

(3) The provisional supervisor of the company may apply to the court for directions in relation to any particular matter arising in connection with the discharge of his duties or the exercise of his powers.

(4) Subject to sections 168ZF(2) and 168ZL, in exercising his powers the provisional supervisor of the company shall be deemed to act as the agent of the company.

(5) Where a person deals with the provisional supervisor of the company in good faith and for good consideration and thereby changes his position or acts to his detriment based on the dealing, the provisional supervisor and the company shall be bound by the provisional supervisor’s actions whether or not the provisional supervisor was acting within his powers.

(6) The Secretary for Financial Services may, by notice in the Gazette, amend the Eighteenth Schedule.

168ZH. Delegations

(1) Subject to subsection (2), the provisional supervisor of the company may, with or without restrictions as he thinks fit, delegate in writing to any director of the company who is an individual any of the duties and powers imposed or conferred on the provisional supervisor under this Ordinance.

(2) Subsection (1) shall not apply to the power under that subsection to delegate.

(3) A delegate of the provisional supervisor of the company -

(a) shall discharge the delegated duties and may exercise the delegated powers as if the delegate were the provisional supervisor;

(b) shall be presumed to be acting in accordance with the terms of the delegation in the absence of evidence to the contrary.

168ZI. Effect of moratorium on directors of company, etc.

(1) Subject to section 168ZO(4)(i), during the moratorium and notwithstanding any other law (including any other provision of this Ordinance) -

(a) a director of the company shall not discharge a duty or exercise a power imposed or

conferred on him in his capacity as such a director;

(b) the provisional supervisor of the company shall discharge such a duty and may exercise such a power.

(2) If a director of the company contravenes subsection (1)(a), he shall be liable to imprisonment and a fine.

(3) The provisional supervisor of the company -

(a) may delegate under section 168ZH to a director of the company a duty or power imposed or conferred on the provisional supervisor under subsection (1)(b);

(b) shall be deemed to act as the company's agent where the provisional supervisor discharges a duty or exercises a power imposed or conferred on the provisional supervisor under subsection (1)(b).

(4) Where a director of the company deals with a person and thereby contravenes subsection (1)(a), then, and notwithstanding that contravention, the director, the provisional supervisor of the company and the company are bound by that dealing if, but only if, that person -

(a) acted in good faith and for good consideration in relation to the dealing; and

(b) changed his position or acted to his detriment based on the dealing.

168ZJ. Effect of moratorium on certain contracts

(1) Subject to subsection (2) and sections 168ZK and 168ZL, the provisional supervisor of the company shall not be liable for a contract entered into, or a debt or other liability incurred, by the company before the relevant date.

(2) The acceptance by the provisional supervisor of the company of any goods or services under a contract referred to in subsection (1) shall not prejudice the operation of that subsection if, but only if, the provisional supervisor has, before that acceptance, advised, in writing, the person who under that contract provides those goods or services, as the case may be, that the provisional supervisor will not be liable under that contract.

(3) It is hereby declared that a contract referred to in subsection (1), and notwithstanding the wording of the contract, shall not be determined, or be deemed to be determined, by reason only of the operation of that subsection or of section 168ZD(3).

168ZK. Liability for certain contracts of employment

(1) The provisional supervisor of the company shall be personally liable for the wages, salaries and other emoluments -

(a) under a contract of employment of an employee of the company existing immediately before the relevant date if, but only if, within 14 days immediately following that date, the

provisional supervisor accepts in writing that contract;

(b) under a contract of employment entered into by the provisional supervisor on or after the relevant date.

(2) Where a contract of employment referred to in subsection (1)(a) -

(a) has not been accepted under that subsection, or terminated, within the period specified in that subsection, then it shall be deemed to be terminated by the company immediately upon the expiration of that period;

(b) is terminated before the expiration of the period referred to in paragraph (a), or deemed to be terminated under that paragraph, then the wages, salaries and other emoluments under the contract -

(i) shall be deemed to be liabilities of the company incurred on or after the relevant date; and

(ii) shall be charged on and paid out of the property of the company by the provisional supervisor in the same priority as qualifying liabilities under subsection (3).

(3) Any sums payable under subsection (1) in respect of liabilities shall, to the extent that the liabilities are qualifying liabilities, be charged on and paid out of the

property of the company in priority to the indemnity given under section 168ZL.

(4) For the purposes of subsection (3), a liability under a contract of employment is a qualifying liability if -

(a) it is a liability to pay a sum by way of wages or salary or contribution to -

(i) an occupational retirement scheme within the meaning of the Occupational Retirement Schemes Ordinance (Cap. 426); or

(ii) a provident fund scheme within the meaning of the Mandatory Provident Fund Schemes Ordinance (Cap. 485); and

(b) it is in respect of services rendered wholly or partly after the acceptance of the contract by the provisional supervisor of the company.

(5) There shall be disregarded for the purposes of subsection (3) so much of any qualifying liability as represents payment in respect of services rendered before the acceptance of the contract by the provisional supervisor of the company.

(6) For the purposes of subsections (4) and (5), wages or salary payable in respect of a period of holiday or absence from work through sickness or other good cause are deemed to be wages or salary, as the case may be, in respect of services rendered in that period.

(7) In this section, “contract of employment”（僱用

合約）means a contract of service or apprenticeship, or a contract personally to execute any work or labour.

168ZL. Indemnity to provisional supervisor

(1) The provisional supervisor of the company shall be entitled to be indemnified out of the property of the company for -

(a) all contracts, debts and other liabilities for which he is liable as the provisional supervisor in the discharge of his duties and the exercise of his powers as the provisional supervisor; and

(b) his remuneration and all reasonable fees, costs and charges,

to the extent that such contracts, debts and other liabilities, and such remuneration and reasonable fees, costs and charges, are not attributable to misconduct or negligence on the part of the provisional supervisor.

(2) Notwithstanding any other law (including any other provision of this Ordinance except section 168ZD(13)(b) or 168ZK), the indemnification given to the provisional supervisor of the company under subsection (1) shall -

(a) have priority to all other claims, whether secured or unsecured, against the company; and

(b) be secured by a lien over the property of the company.

(3) The lien referred to in subsection (2)(b) shall, notwithstanding any other law (including any other provision

of this Ordinance except section 168ZD(13)(b) or 168ZK), have priority over all other securities over the property of the company.

168ZM. Remuneration of provisional supervisor

(1) Subject to subsections (3) and (5) and section 168ZT(16), the provisional supervisor of the company shall be entitled to be remunerated, in discharging his duties and exercising his powers as the provisional supervisor, in accordance with a scale of fees approved in writing by the Official Receiver for the purposes of this section.

(2) The provisional supervisor of the company may make an application to the court to be remunerated at a rate other than the approved scale of fees.

(3) The court shall not grant an application made under subsection (2) by the provisional supervisor of the company unless the court is satisfied that the grant thereof is warranted because of -

(a) the complexity (or otherwise) of the particular case;

(b) any additional responsibilities of an exceptional kind or degree placed on the provisional supervisor;

(c) the value and nature of the property with which the provisional supervisor has to deal; or

(d) any other factor declared in a notice under subsection (6) to be a factor to which this subsection shall apply.

(4) If a relevant creditor is of the opinion that the remuneration of the provisional supervisor of the company based on the approved scale of fees is excessive, he may, if he has the agreement in writing to do so of not less than 50% in value of all relevant creditors (including the first-mentioned relevant creditor), make an application to the court to reduce that scale in relation to that provisional supervisor.

(5) The court shall determine an application made under subsection (4) by confirming, or reducing, the approved scale of fees in relation to the provisional supervisor of the company the subject of the application.

(6) The Secretary for Financial Services may, by notice in the Gazette, and subject to such conditions, if any, as are specified in the notice, declare a factor to be a factor to which subsection (3) shall apply.

(7) It is hereby declared that a notice under subsection (6) is subsidiary legislation.

168ZN. Statement of affairs

(1) The provisional supervisor of the company shall, as soon as practicable after the relevant date, by notice in the specified form given to a specified person, require the person to provide the provisional supervisor with a statement of the affairs of the company -

(a) disclosing -

(i) particulars of its property, debts and other liabilities;

(ii) the names and addresses of its creditors;

(iii) details of any securities held by its creditors, including the dates when the securities were respectively given; and

(iv) such further or other information as the provisional supervisor may reasonably require in the notice; and

(b) not later than 7 days after giving of the notice or such further period, if any, permitted in writing by the provisional supervisor.

(2) The provisional supervisor of the company may, in a notice under subsection (1) given to a specified person or in another notice in the specified form given to that or another specified person, require the person to -

(a) deliver to the provisional supervisor all documents and records relating to the company in that person's custody or under his control;

(b) inform the provisional supervisor as to the whereabouts of any such documents and records within the knowledge of that person;

(c) attend on the provisional supervisor at a place in Hong Kong and at a reasonable time; and

(d) provide the provisional supervisor with such information about the business, property, affairs or financial circumstances of the company as the provisional supervisor may reasonably request in the notice or at a meeting arising from a requirement referred to in paragraph (c).

(3) Subject to subsection (4), a specified person the subject of a requirement under subsection (1) or (2) shall be entitled to be paid all reasonable costs incurred or to be incurred in complying with the requirement.

(4) Subsection (3) shall not apply unless the specified person referred to in that subsection submits to the provisional supervisor of the company a statement in writing -

(a) of the estimated costs referred to in that subsection; and

(b) before incurring any of those costs.

(5) If a specified person without reasonable excuse fails to comply with a requirement under subsection (1) or (2), he shall be guilty of an offence and, if found guilty, shall be liable to a fine and, for continued contravention, to a daily default fine.

(6) In this section, "specified person"（指明人士）, in relation to a company, means 1 or more of the following -

(a) an officer or employee of the company;

(b) a person who has taken part in the formation, promotion, administration or management of the company within 1 year before the relevant date;

(c) a person who -

(i) has been an officer or employee of the company within 1 year before the relevant date; and

(ii) is, in the reasonable opinion of the provisional supervisor of the company, capable of complying with a requirement under subsection (1) or (2);

(d) a former provisional supervisor of the company.

168ZO. Removal and resignation of provisional supervisor

(1) The court may -

(a) upon application made to it by a relevant creditor who has the agreement in writing to do so of not less than 50% in value of all relevant creditors (including the first-mentioned relevant creditor), order the termination of the appointment of the provisional supervisor of the company for cause shown;

(b) in the case of such an application which is refused, order the person who made the application to pay the costs of any other person appearing or represented at the hearing of the application.

(2) The provisional supervisor of the company may only resign his office with the leave of the court.

(3) The court shall not grant the leave referred to in subsection (2) unless it is satisfied that -

(a) the circumstances are exceptional;

(b) for the provisional supervisor of the company to continue in office would cause severe personal hardship to him; and

(c) another qualified person has consented to be appointed to be the provisional supervisor of the company.

(4) Where -

(a) the court makes an order under subsection (1)(a), or grants the leave referred to in subsection (2), in respect of the provisional supervisor of the company; or

(b) the provisional supervisor of the company -

(i) dies; or

(ii) ceases to be a qualified person,

then -

(i) section 168Y shall apply in relation to the appointment of a qualified person to be the next provisional supervisor of the company (in

which case section 168ZI(1)(a) shall not apply in relation to section 168Y) unless the court has stated that section 168Y shall not apply -

(A) where paragraph (a) applies, in the order under that paragraph;

(B) where paragraph (b) applies, upon application made to it by a relevant creditor or the Official Receiver;

(ii) if the court has stated that section 168Y shall not apply, the court shall appoint a qualified person to be the next provisional supervisor of the company if the qualified person has consented to the appointment (but the provisions of section 168ZA shall not apply in relation to any such appointment);

(iii) the moratorium shall cease if there is no provisional supervisor of the company within -

(A) subject to sub-subparagraph (B), 14 days immediately following the relevant event specified in paragraph (a) or (b);

(B) such longer period, not exceeding 30 days after such event, as the court may specify.

(5) Where subsection (4)(i) or (ii) is applicable, the appointment of a qualified person to be the next provisional supervisor of the company shall not come into effect unless and until there is filed with the Official Receiver, the

Registrar and the High Court Registry a notice of the consent of the qualified person to the appointment -

(a) in the specified form; and

(b) signed by the qualified person.

(6) The provisional supervisor of the company who has become such provisional supervisor by virtue of the operation of subsection (4) (i) or (ii) shall, as soon as practicable, cause a notice in the specified form of his appointment to be published in -

(a) the Gazette;

(b) 1 English language newspaper circulating generally in Hong Kong; and

(c) 1 Chinese language newspaper circulating generally in Hong Kong.

(7) Subject to subsection (8), upon the appointment of a qualified person as the next provisional supervisor of the company taking effect in accordance with subsection (5), the immediately preceding provisional supervisor of the company shall thereupon cease to be the provisional supervisor.

(8) The fact that a person has ceased to be the provisional supervisor of the company by virtue of the operation of this section shall not affect that person’s liability for any act or omission done, caused, permitted or made prior to his ceasing to be the provisional supervisor.

(9) The provisional supervisor or former provisional supervisor of the company shall, if the company goes into

liquidation after the cessation of the moratorium, pass over all documents and disclose all information -

(a) obtained by him in his capacity as the provisional supervisor; and

(b) to the liquidator of the company.

(10) Where in the winding up of a company it appears to the liquidator that the former provisional supervisor of the company was in breach of any of his duties under this Ordinance -

(a) the liquidator shall prepare a report on the breach;

(b) where the liquidator is not the Official Receiver, the liquidator shall forward a copy of the report to the Official Receiver;

(c) the Official Receiver may forward a copy of the report to the Hong Kong Society of Accountants or The Law Society of Hong Kong if the former provisional supervisor is or was a member of either Society.

168ZP. Priority of funds provided as operating capital during moratorium

(1) Notwithstanding any other law (including any other provision of this Ordinance except sections 168ZD, 168ZK and 168ZL and subsections (2) and (3)), relevant funds shall, in relation to the voluntary arrangement in respect of the company or the winding up of the company, have priority over

the debts of the creditors of the company, whether or not those debts are preferential or secured or otherwise.

(2) Subsection (1) shall not apply to a debt of a creditor of the company where the debt is secured by a charge which -

(a) is a fixed charge;

(b) was at the time of its creation a fixed charge; and

(c) was created before the relevant date.

(3) No person shall use relevant funds to discharge, whether in whole or in part, any liability of the company -

(a) to any person who provided any part of those funds; and

(b) existing immediately before the relevant date.

(4) A relevant creditor shall be given an opportunity to provide relevant funds to the company before a person (whether or not a creditor of the company) who is not a relevant creditor.

(5) The provisional supervisor of the company shall give a relevant creditor an opportunity referred to in subsection (4) by giving the creditor a notice -

(a) containing a statement to the effect that relevant creditors are invited to contribute funds as operating capital for the company;

(b) specifying the total amount the provisional supervisor is seeking as the minimum operating capital required.

(6) In this section -

"relevant funds"（有關資金）, in relation to a company, means funds -

(a) provided -

(i) during the moratorium;

(ii) to the company; and

(iii) as operating capital for the company; and

(b) the total amount of which is not less than the amount specified in the notice under subsection (5) as being the minimum operating capital required.

168ZQ. Right of major creditor to decide whether provisional supervisor proceeds with proposal

(1) The provisional supervisor of the company shall, not later than 3 working days (excluding Saturdays) after the relevant date, give a notice in the specified form ("1st notice") to each major creditor, if any, of the company -

(a) containing a statement to the effect that he has been appointed to be the provisional supervisor of the company for the purposes of examining whether a proposal can be made to the creditors of the company for a voluntary arrangement in respect of the company and, if so, making the proposal;

(b) requiring the major creditor to -

(i) decide in the notice in the specified form ("2nd notice")

attached to the 1st notice whether or not the major creditor agrees with the provisional supervisor proceeding to prepare the proposal; and

(ii) give the 2nd notice to the provisional supervisor not later than 3 working days after the major creditor receives the 1st notice or 7 days after the relevant date, whichever is the earlier; and

(c) to which is attached a copy of this section and an address stated to be the address at which the 2nd notice may be received.

(2) Where a major creditor decides that he does not agree with the provisional supervisor of the company proceeding to prepare the proposal, then -

(a) the moratorium shall cease immediately the provisional supervisor receives the 2nd notice concerned at the address referred to in subsection (1) (c);

(b) if section 168ZD(11) terminated the appointment of a provisional liquidator or liquidator of the company and stayed the winding up proceedings of the company, that section shall be deemed never to have so terminated that appointment and stayed those proceedings;

(c) the provisional supervisor shall as soon as practicable after receipt of that notice cause a notice in the specified form of the cessation of the moratorium to be -

(i) filed with the Official Receiver, the Registrar and the High Court Registry; and

(ii) published in the Gazette and in -

(A) 1 English newspaper circulating generally in Hong Kong; and

(B) 1 Chinese language newspaper circulating generally in Hong Kong; and

(d) the provisional supervisor shall vacate his office as soon as practicable.

(3) Where a major creditor -

(a) decides that he does not agree with the provisional supervisor of the company proceeding to prepare the proposal but fails to give the provisional supervisor the 2nd notice concerned not later than 3 working days after the major creditor receives the 1st notice concerned or 7 days after the relevant date, whichever is the earlier; or

(b) decides that he agrees with the provisional supervisor of the company proceeding to prepare the proposal,

then, unless subsection (2) applies in the case of any other major creditor of the company -

(i) the provisional supervisor may proceed to prepare the proposal;

(ii) the major creditor shall be subject to the provisions of this Part in like manner as any other creditor of the company is so subject.

(4) Any charge on the undertaking or property of the company created at any time within the period of 12 months immediately preceding the relevant date shall, unless it is proved that the company was solvent immediately after the creation of the charge, be invalid for the purposes of this Part except for -

(a) the amount of any cash paid to the company at the time of or subsequent to the creation of, and in consideration for, the charge; and

(b) interest on that amount at the rate specified in the charge, or at the rate of 12% per annum, whichever is the less.

(5) In this section, "major creditor"（主要債權人）, in relation to a company, means the holder of a charge over the whole or substantially the whole of the company's property if, but only if, the claim under the charge amounts to not less than $33\frac{1}{3}$% of the liabilities of the company immediately before the relevant date.

168ZR. Requirements for relevant meetings of creditors

(1) The provisional supervisor of the company shall call a meeting of relevant creditors of the company where he is satisfied that -

(a) he will be able to complete the proposal before the expiration of the moratorium (including the moratorium as extended under section 168ZE);

(b) he will be able to complete the proposal but not before the expiration of 6 months immediately following the relevant date; or

(c) none of the relevant purposes can be achieved.

(2) Where the date has been set for a relevant meeting of creditors (other than an adjournment thereof), the provisional supervisor of the company shall prepare a report to creditors on the company and shall -

(a) not less than 7 days before that date, cause a notice in the specified form to be published -

(i) in -

(A) 1 English language newspaper circulating generally in Hong Kong; and

(B) 1 Chinese language newspaper circulating generally in Hong Kong; and

(ii) advising creditors of the company -

(A) of the date, time and place of the meeting;

(B) to give notice in writing, if they have not already done so -

(I) to the provisional supervisor at the address specified in the notice;

(II) of their claims against the company; and

(III) not later than 2 days before that date;

(b) give a notice in the specified form -

(i) to each relevant creditor of the company whose name and address -

(A) appears in the company's statement of affairs submitted under section 168ZN to the provisional supervisor;

(B) is otherwise known to the provisional supervisor;

(ii) setting out in full each resolution proposed to be passed at the meeting;

(iii) to which is attached a copy of the report to creditors on the company or, alternatively, stating that such copy -

(A) will be supplied upon request made to the provisional supervisor; and

(B) is available for inspection during normal office hours at the address specified in the notice;

(iv) specifying the date, time and place of the meeting;

(v) attached to which are instruments providing for the appointment of a proxy;

(vi) where subsection (1) (a) is applicable -

(A) to which is attached a copy of a summary of the statement of affairs of the company or, alternatively, stating that such copy -

(I) will be supplied upon request made to the provisional supervisor; and

(II) is available for inspection during normal office hours at the address

specified in the notice;

(B) stating that the purpose of the meeting is to -

(I) approve the proposal (whether with or without modifications);

(II) adjourn the meeting in order that the provisional supervisor may submit a modified form of the proposal to the adjourned meeting; or

(III) reject the proposal, resolve that the company be wound up as a creditors' voluntary winding up and appoint a liquidator;

(C) containing -

(I) a statement, with reasons, as to the decision of the provisional supervisor as to

which of the relevant purposes, if any, are capable of being achieved;

(II) a statement, with reasons, as to the decision of the provisional supervisor as to which of the relevant purposes, if any, are not capable of being achieved; and

(III) a summary of the proposal containing a statement as to the advantages and disadvantages to the creditors of the company of the proposal as opposed to the advantages and disadvantages to the creditors of a liquidation of the company; and

(D) to which is attached a copy of the proposal or, alternatively, stating that such copy -

(I) will be supplied upon request made to the provisional supervisor; and

(II) is available for inspection during normal office hours at the address specified in the notice;

(vii) where subsection (1) (b) is applicable -

(A) to which is attached a copy of a summary of the statement of affairs of the company or, alternatively, stating that such copy -

(I) will be supplied upon request made to the provisional supervisor; and

(II) is available for inspection during normal office hours at the address

specified in the notice;

(B) to which is attached a statement, with reasons, as to why the provisional supervisor has been unable to complete the proposal before the expiration of the moratorium or, alternatively, stating that a copy of such statement -

(I) will be supplied upon request made to the provisional supervisor; and

(II) is available for inspection during normal office hours at the address specified in the notice;

(C) stating that the purpose of the meeting is to -

(I) consider the statement referred to in sub-subparagraph (B); and

(II) decide whether or not the moratorium should

be extended and, if so, for what period and on what terms;

(viii) where subsection (1) (c) is applicable -

(A) to which is attached a statement, with reasons, as to the decision of the provisional supervisor as to why he considers none of the relevant purposes is capable of being achieved or, alternatively, stating that a copy of such statement -

(I) will be supplied upon request made to the provisional supervisor; and

(II) is available for inspection during normal office hours at the address specified in the notice;

(B) stating that the purpose of the meeting is to consider the decision of the provisional supervisor referred to in

sub-subparagraph (A) and resolve that the company be wound up as a creditors' voluntary winding up and appoint a liquidator.

(3) At any adjournment of a relevant meeting of creditors to which subsection (1) (a) or (b) applies, the provisional supervisor of the company shall give a notice in the specified form to each relevant creditor referred to in subsection (2) (b) (i) -

(a) which complies with the requirements of subsection (2) (b) (i), (ii), (iv) and (v); and

(b) where subsection (1) (a) is applicable -

(i) stating that the purpose of the meeting is to -

(A) approve the proposal as modified;

(B) adjourn the meeting in order that the provisional supervisor may submit a further modified form of the proposal; or

(C) reject the proposal as modified, resolve that the company be wound up as a creditors' voluntary winding up and appoint a liquidator;

(ii) containing a summary of the proposal as modified; and

(iii) to which is attached a copy of the proposal as modified or, alternatively, stating that such copy -

(A) will be supplied upon request made to the provisional supervisor; and

(B) is available for inspection during normal office hours at the address specified in the notice;

(c) where subsection (1) (b) is applicable stating that the purpose of the meeting is to -

(i) review the extension; and

(ii) resolve to continue or terminate the extension and, in the latter case, that the company be wound up as a creditors' voluntary winding up and to appoint a liquidator.

(4) The Secretary for Financial Services may, by notice in the Gazette, amend subsection (2) or (3).

(5) The chairman of the relevant meeting of creditors concerned shall cause a copy of each resolution passed or rejected at the meeting, certified by the chairman to be a true copy of such resolution, to be filed with the Official Receiver, the Registrar and the High Court Registry.

(6) In this section -

"report to creditors"(致債權人報告書),in relation to a company, means a report in the specified form concerning the business, property, affairs, financial circumstances and prospects of the company.

168ZS. Resolutions of relevant meetings of creditors

(1) At a relevant meeting of creditors to which section 168ZR(1)(a) is applicable -

(a) the meeting shall resolve -

(i) to approve the proposal (whether with or without modifications); or

(ii) the following -

(A) to reject the proposal;

(B) where the provisional supervisor of the company was appointed by virtue of section 168Y(1) (a), that the company be wound up as a creditors' voluntary winding up; and

(C) to appoint a liquidator at the meeting, and notwithstanding any other law (including any other provision of this Ordinance);

(b) no modification to the proposal may be made unless the provisional supervisor consents to the modification;

(c) the proposal shall be deemed to be approved by the creditors when the resolution approving the proposal (whether with or without modifications) is passed.

(2) At a relevant meeting of creditors to which section 168ZR(1) (b) is applicable the meeting shall resolve -

(a) to extend the moratorium for such period and on such terms as the meeting thinks fit (except that the extension shall not commence before the period of 6 months immediately following the relevant date); or

(b) not to extend the moratorium and -

(i) where the provisional supervisor of the company was appointed by virtue of section 168Y(1) (a), that the company be wound up as a creditors' voluntary winding up; and

(ii) to appoint a liquidator at the meeting, and notwithstanding any other law (including any other provision of this Ordinance).

(3) Terms imposed under subsection (2) (a) on an extension of the moratorium may require the provisional supervisor of the company to call a subsequent meeting of creditors to review the extension from time to time.

(4) At a relevant meeting to which section 168ZR(1) (c) is applicable -

(a) for any resolution to pass there must be in excess of 50% in value of the relevant creditors present in person or by proxy and voting on the resolution;

(b) the meeting shall resolve -

(i) where the provisional supervisor of the company was appointed by virtue of section 168Y(1) (a), that the company be wound up as a creditors' voluntary winding up; and

(ii) to appoint a liquidator at the meeting, and notwithstanding any other law (including any other provision of this Ordinance).

(5) Where subsection (1) (a) (ii), (2) (b) or (4) (b) is applicable to a relevant meeting of creditors -

(a) the liquidator appointed shall as soon as practicable after his appointment cause a notice in the specified form of his appointment to be -

(i) filed with the Official Receiver, the Registrar and the High Court Registry; and

(ii) published in the Gazette and in -

(A) 1 English language newspaper circulating generally in Hong Kong; and

(B) 1 Chinese language newspaper circulating generally in Hong Kong;

(b) notwithstanding any other law (including any other provision of this Ordinance), the creditors' voluntary winding up referred to in that subsection shall be deemed to commence on the relevant date (except that, for the purposes of sections 263, 264, 264A and 265, that winding up shall be deemed to commence) at the time of the passing of the resolution referred to in that subsection for that winding up; and

(c) the other provisions of this Ordinance applicable to the liquidation of the company shall apply with such modifications as are necessary to take into account the operation of that subsection and paragraphs (a) and (b).

(6) Where subsection (1) (a) (ii) (A), (2) (b) or (4) (b) is applicable to a relevant meeting of creditors and the provisional supervisor of the company was appointed by virtue of section 168Y (1) (b) or (c), then, if section 168ZD (11) terminated the appointment of a provisional liquidator or liquidator of the company and stayed the winding up proceedings of the company, that last-mentioned section shall be deemed never to have so terminated that appointment and stayed those proceedings.

168ZT. Proceedings and voting at relevant meetings of creditors

(1) The persons entitled to attend a relevant meeting of creditors are -

(a) the provisional supervisor of the company;

(b) each relevant creditor of the company who has given notice of his claim against the company in accordance with the requirements of the notice under section 168ZC or 168ZR (2) (a) (ii);

(c) the shareholders of the company; and

(d) the directors of the company.

(2) The relevant creditors present and voting at a relevant meeting of creditors shall form one class of voters only.

(3) The chairman of a relevant meeting of creditors shall be -

(a) the provisional supervisor of the company; or

(b) a partner, or employee, of the provisional supervisor -

(i) who is, in the opinion of the provisional supervisor, experienced in insolvency matters; and

(ii) nominated in writing by the provisional supervisor to be the chairman of the meeting.

(4) The chairman of a relevant meeting of creditors, the provisional supervisor of the company or any other person -

(a) may hold a special proxy or proxies; and

(b) in the case of any such proxy, shall vote or otherwise as directed by the principal.

(5) Any person other than the chairman of a relevant meeting of creditors or the provisional supervisor of the company may hold a general proxy or proxies.

(6) The quorum for a relevant meeting of creditors shall be one relevant creditor present and entitled to vote.

(7) Where -

(a) there is no quorum within 30 minutes from the time appointed for a relevant meeting of creditors; or

(b) at a relevant meeting of creditors the meeting fails to -

(i) resolve that the company be wound up as a creditors' voluntary winding up when the meeting is required to do so by virtue of section 168ZS;

(ii) appoint a liquidator of the company when the meeting is required to do so by virtue of that section; or

(iii) both pass the resolution referred to in subparagraph (i) and make the appointment referred to in subparagraph (ii),

then -

(i) in the case of paragraph (a) (other than where the provisional supervisor of the company was appointed by virtue of section 168Y (1) (b) or

(c)) or paragraph (b) (i) or (iii), it shall be deemed for all purposes that the meeting resolved that the company be wound up as a creditors' voluntary winding up;

(ii) in the case of paragraph (a) or (b) (i), (ii) or (iii) -

(A) the provisional supervisor of the company shall appoint a liquidator of the company (which may be himself) as soon as is practicable but, in any case, not later than 7 days after the date of the meeting, and notwithstanding any other law (including any other provision of this Ordinance); and

(B) it shall be deemed for all purposes that the meeting appointed that liquidator.

(8) Where the provisional supervisor of the company fails to comply with subsection (7) (ii) (A) within the period specified in that subsection, then, immediately upon the expiration of that period, he shall be deemed to have appointed himself as the liquidator of the company.

(9) Where section 168ZR (1) (a) is applicable to a relevant meeting of creditors, the meeting may only be adjourned to allow the provisional supervisor of the company time to modify the proposal or to apply under section 168ZE for an extension of the moratorium.

(10) Where section 168ZR (1) (b) is applicable to a relevant meeting of creditors, the meeting may only be

adjourned to a later date, not exceeding 6 months after the date on which the meeting is held, if the meeting resolves to extend the moratorium.

(11) A relevant meeting of creditors to which section 168ZR(1) (c) is applicable shall not be adjourned.

(12) Subject to subsections (13), (14) and (15), each relevant creditor who is entitled to attend a relevant meeting of creditors shall be entitled to vote at the meeting.

(13) Votes of relevant creditors shall be calculated according to the amount of the creditor's debt on the relevant date.

(14) At a relevant meeting of creditors to which section 168ZR (1) (a) or (b) is applicable, for any resolution to pass approving the proposal or a modification of the proposal, there must be a majority in number and in excess of $66^{2}/_{3}$% in value of the creditors present in person or by proxy and voting on the resolution.

(15) Subsection (14) applies in respect of any other resolution proposed at a relevant meeting of creditors to which section 168ZR (1) (a) or (b) is applicable, but substituting "one-half" for "two-thirds" appearing in that subsection.

(16) At a relevant meeting of creditors to which section 168ZR (1) (a) or (b) is applicable, a resolution that the provisional supervisor of the company may be remunerated at a rate higher than the approved scale of fees may be passed or rejected.

(17) Where -

(a) subsection (7) (i) is applicable -

(i) notwithstanding any other law (including any other provision of this Ordinance), the creditors' voluntary winding up referred to in that subsection shall be deemed to commence on the relevant date (except that, for the purposes of sections 263, 264, 264A and 265, that winding up shall be deemed to commence) at the time that it was deemed for all purposes that the meeting referred to in that subsection resolved that the company be wound up as a creditors' voluntary winding up; and

(ii) the other provisions of this Ordinance applicable to the liquidation of the company shall be construed with such modifications as are necessary to take into account the operation of that subsection and subparagraph (i);

(b) subsection (7) (ii) or (8) is applicable -

(i) the liquidator appointed shall as soon as practicable after the appointment cause a notice in the

specified form of his appointment to be -

(A) filed with the Official Receiver, the Registrar and the High Court Registry; and

(B) published in the Gazette and in -

(I) 1 English language newspaper circulating generally in Hong Kong; and

(II) 1 Chinese language newspaper circulating generally in Hong Kong;

(ii) the remuneration of the liquidator as liquidator shall be at the same rate as the remuneration the provisional supervisor of the company was receiving as provisional supervisor immediately before the provisional supervisor vacated his office; and

(iii) the other provisions of this Ordinance applicable to the liquidation of the company shall apply with such modifications as are necessary to take into account the

operation of that subsection and subparagraphs (i) and (ii).

(18) At a relevant meeting of creditors -

(a) a relevant creditor shall not vote in respect of a debt for an unliquidated amount, or any debt the value of which is not ascertained, except where the chairman of the meeting agrees to put upon the debt an estimated reasonable minimum value for the purpose of entitlement to vote;

(b) the chairman has power to admit or reject a relevant creditor's claim (whether in whole or in part) for the purpose of the creditor's entitlement to vote;

(c) if the chairman is in doubt as to whether a relevant creditor's claim should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote subject to that vote being subsequently declared invalid if the objection to the claim is sustained.

(19) An appeal against the chairman's decision on a relevant creditor's entitlement to vote may be made -

(a) by application to the court not later than 30 days after the conclusion of the relevant meeting of creditors at which the decision was made; and

(b) by any relevant creditor of the company.

(20) On an appeal under subsection (19) -

(a) where subsection (18) (a) or (b) is applicable, the court may reverse or vary the chairman's decision concerned (and, if required, declare a relevant creditor's vote invalid) only if it is satisfied that the decision was manifestly unreasonable;

(b) where subsection (18) (c) is applicable, the court may declare a relevant creditor's vote invalid if it is satisfied that the creditor had no entitlement to vote;

(c) in any case, the court may order another relevant meeting of creditors to be summoned or make such other order as it thinks just (including an order to extend the moratorium).

(21) The chairman of a relevant meeting of creditors is not personally liable for any costs incurred by any person in respect of an appeal under subsection (19).

168ZU. Implementation of relevant creditors' resolutions

(1) Where the proposal has been approved by a resolution passed at a relevant meeting of creditors -

(a) the appointment of the provisional supervisor of the company shall terminate except for the purpose of concluding the meeting and matters incidental thereto; and

(b) the terms of the voluntary arrangement shall take effect and shall bind -

(i) each relevant creditor who was given notice under section 168ZR(2) (b) or (3) in respect of the meeting (and whether or not the creditor notified the provisional supervisor of any claim against the company or attended the meeting);

(ii) the company;

(iii) the members of the company; and

(iv) the supervisor of the voluntary arrangement.

(2) The supervisor of the voluntary arrangement shall as soon as practicable after his appointment -

(a) file copies of the voluntary arrangement with the Official Receiver, the Registrar and the High Court Registry; and

(b) cause a notice in the specified form to be published -

(i) in the Gazette and in -

(A) 1 English language newspaper circulating generally in Hong Kong; and

(B) 1 Chinese language newspaper circulating generally in Hong Kong; and

(ii) containing a statement to the effect that he has been appointed to be the supervisor of the company for the

purpose of implementing a voluntary arrangement in respect of the company.

(3) Where the former provisional supervisor of the company does not become the supervisor of the voluntary arrangement in respect of the company, the former provisional supervisor shall deliver to the supervisor all the documents of the company in his custody or under his control.

168ZV. Effect of voluntary arrangement

(1) While the voluntary arrangement is in effect in respect of the company -

(a) no creditor bound by the arrangement may commence or continue any winding up proceedings against the company;

(b) no resolution may be passed or made by the members or directors of the company for the winding up of the company;

(c) no receiver of the company may be appointed by a creditor bound by the arrangement or, if already appointed, no receiver may exercise any powers incidental to the office;

(d) no creditor bound by the arrangement may take any step to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession; and

(e) no creditor bound by the arrangement may commence any proceedings, execution, distress or other legal process against the company.

(2) The voluntary arrangement shall cease to have effect in the events specified in the arrangement.

(3) Where the company is subject to the voluntary arrangement, every invoice, order for goods or business letter issued by or on behalf of the company or the supervisor of the voluntary arrangement, being a document on or in which the name of the company appears, shall contain a statement that the company is subject to the voluntary arrangement.

168ZW. Supervisor of voluntary arrangement

(1) No person shall be appointed to be the supervisor of the voluntary arrangement in respect of the company -

(a) except -

(i) a member of the panel; or

(ii) a person in respect of whom the Official Receiver has stated in writing that he is satisfied that the person -

(A) has particular skills which warrant him being appointed to be the supervisor of the voluntary arrangement; and

(B) is a fit and proper person to be so appointed; and

(b) unless he provides such security, and in such form, as is prescribed in regulations made under section 168ZZA.

(2) Subject to any directions under subsection (5), the supervisor of the voluntary arrangement shall -

(a) discharge such duties and exercise such powers as are specified in the arrangement;

(b) ascertain on behalf of the creditors of the company that the arrangement is being adhered to and implemented by the company in accordance with its terms; and

(c) supervise the arrangement having regard to the interests of -

(i) the creditors of the company bound by the arrangement;

(ii) the company; and

(iii) the members of the company.

(3) The supervisor of the voluntary arrangement -

(a) may require an officer or employee of the company to provide such information about the business, property, affairs or financial circumstances of the company as the supervisor may reasonably request;

(b) shall have access to the premises (except domestic premises) of the company and all books and records of the company upon reasonable notice; and

(c) may, where the supervisor is satisfied that the arrangement is not being adhered to and implemented by the company in accordance with its terms, present a petition to the court for the winding up of the company by the court.

(4) An officer or employee of the company who, without reasonable excuse, fails to comply with a requirement under subsection (3) (a) shall be guilty of an offence.

(5) The supervisor of the voluntary arrangement may apply to the court for directions in relation to any particular matter arising in connection with his duties and powers under the arrangement and, without prejudice to the generality of the foregoing, the court may by such a direction permit a deviation from the arrangement if, but only if, the court is satisfied that the deviation would not affect the substance of the arrangement.

(6) A party to the voluntary arrangement who is aggrieved by any act, omission or decision of the supervisor of the voluntary arrangement may make an application to the court.

(7) The court shall determine an application made under subsection (6) by -

(a) confirming, reversing or modifying any act, omission or decision of the supervisor of the voluntary arrangement;

(b) giving the supervisor directions;

(c) removing the supervisor from office; or

(d) making such other order as it sees fit.

168ZX. Vacation of office, etc. of supervisor

Where -

(a) it is expedient to appoint a person to discharge the duties of the supervisor of the voluntary arrangement; and

(b) it is inexpedient, difficult or impracticable for an appointment to be made without the assistance of the court,

the court may, upon the application of the company, the directors of the company or a creditor of the company bound by the arrangement, make an order appointing a supervisor of the voluntary arrangement, either in substitution for the existing supervisor or to fill a vacancy.

168ZY. Notification

Where -

(a) the supervisor of the voluntary arrangement has replaced a former supervisor of the voluntary arrangement; or

(b) the voluntary arrangement has ceased to have effect,

the supervisor shall file a notice in the specified form of his appointment, or a notice in the specified form of the cessation of the voluntary arrangement, as the case may be, with the Official Receiver, the Registrar and the High Court Registry not later than 14 days after the date of his appointment or the cessation of the voluntary arrangement, as the case may be.

168ZZ. Power of Official Receiver to specify forms

(1) Subject to subsection (2), the Official Receiver, after consultation with the Registrar, may specify the form of any document required under this Part to be in the specified form and the form of such other documents required for the purposes of this Part as he thinks fit.

(2) The Official Receiver's power under subsection (1) shall be subject to any express requirement under this Part for a form, whether specified or otherwise, to comply with that requirement, but that requirement shall not restrict the exercise of that power in respect of that form to the extent that, in the opinion of the Official Receiver, his exercise of that power in respect of that form does not contravene that requirement.

(3) The Official Receiver's power under subsection (1) may be exercised in such a way as to -

(a) include in the specified form of any document referred to in that subsection a statutory declaration -

(i) to be made by the person completing the form; and

(ii) as to whether the particulars contained in the form are true and correct to the best of that person's knowledge and belief;

(b) specify 2 or more forms of any document referred to in that subsection, whether as alternatives, or to provide for particular

circumstances or particular cases, as the Official Receiver thinks fit.

(4) A form specified under this section shall be -

(a) completed in accordance with such directions and instructions as are specified in the form;

(b) accompanied by such documents as are specified in the form; and

(c) if the completed form is required to be provided to -

(i) the Official Receiver or the Registrar;

(ii) another person on behalf of the Official Receiver or the Registrar;

or

(iii) any other person,

so provided in the manner, if any, specified in the form.

168ZZA. Regulations

(1) The Secretary for Financial Services may make regulations prescribing anything that is required or permitted to be prescribed under this Part.

(2) Regulations made under this section may -

(a) specify criteria for determining whether or not a company was solvent for the purposes of section 168ZQ(4);

(b) specify the procedures to be followed at relevant meetings of creditors;

(c) without prejudice to the generality of paragraph (b), specify the powers of the chairman of a relevant meeting of creditors, in particular in relation to the adjudication of claims against the company by relevant creditors;

(d) without prejudice to the generality of paragraph (c), provide that any adjudication referred to in that paragraph (and notwithstanding any other law, including any other provision of this Ordinance) shall not be overturned or otherwise varied by any court unless -

(i) the court concludes that the adjudication was manifestly unreasonable; or

(ii) the chairman of the relevant meeting of creditors concerned consents thereto;

(e) specify the Official Receiver as being the person who must be satisfied that a requirement imposed by the regulations has been met;

(f) make different provisions for different circumstances and provide for a particular case or class of case;

(g) be made so as to apply only in such circumstances as are specified in the regulations;

(h) provide for the better carrying into effect of the provisions of this Part;

(i) provide for such incidental, consequential, evidential, transitional and supplemental provisions as are necessary or expedient for the purpose of giving full effect to the provisions of this Part.

(3) Any regulations made under this section may prescribe offences in respect of contraventions of the regulations and may provide for the imposition in respect of any such offence of a fine not exceeding level 6 and of imprisonment for a period not exceeding 2 years and, in the case of a continuing offence, to a daily penalty not exceeding $1,000.

(4) In this section, "daily penalty"（每天罰款）means a penalty for each day on which the offence is continued after conviction therefor.".

25. Subheading amended

The subheading after section 187 is amended by repealing **"in Winding Up"** and substituting **"and Liquidators".**

26. Statement of company's affairs to be submitted to provisional liquidator or liquidator

Section 190 is amended -

(a) in subsections (1), (2) and (3), by repealing “Official Receiver” wherever it appears and substituting “provisional liquidator or liquidator”;

(b) in subsection (4) -

(i) by repealing “Official Receiver or provisional liquidator, as the case may be,” and substituting “liquidator or provisional liquidator”;

(ii) by repealing “Official Receiver may” and substituting “provisional liquidator or liquidator may”.

27. Report by Official Receiver or liquidator

Section 191 is amended -

(a) in subsection (1), by repealing “Official Receiver” and substituting “liquidator”;

(b) in subsections (2) and (3), by adding “or liquidator” after “Official Receiver”.

28. Subheading repealed

The subheading **“liquidators”** before section 192 is repealed.

29. Power of court to appoint liquidators

Section 192 is amended by adding”, provisionally or otherwise,” after “liquidators”.

30. Appointment, style, etc. of liquidators

Section 194 is amended -

(a) in subsection (1) -

(i) in paragraph (a), by adding “and subsection (1A)” after “(aa)”;

(ii) in paragraph (b), by repealing “in the place of the provisional liquidator”;

(iii) by repealing paragraph (d);

(b) by adding -

“(1A) Where the Official Receiver -

(a) is the provisional liquidator of the company by virtue of subsection (1) (a); and

(b) is of the opinion that the property of the company is not likely to exceed in value $200,000,

he may, at any time, appoint 1 or more persons as provisional liquidator in his place.”.

31. **Provisions where person other than Official Receiver is appointed liquidator**

Section 195 is amended -

(a) by repealing “appointed liquidator” and substituting “appointed provisional liquidator or liquidator under section 194”;

(b) by repealing paragraph (a) and substituting -

"(a) shall forthwith notify his appointment to the Registrar and give security in the prescribed manner to the satisfaction of the Official Receiver;".

32. General provisions as to liquidators

Section 196 is amended -

(a) by repealing subsection (1) and substituting -

"(1) A provisional liquidator or liquidator appointed under section 193 or 194 may resign or, on cause shown, be removed by the court.

(1A) A provisional liquidator appointed under section 194 (1A) shall be remunerated -

(a) in accordance with a scale of fees approved from time to time by the Official Receiver; or

(b) on such other basis as the Official Receiver approves in writing.";

(b) in subsection (2), by repealing "Where" and substituting "Subject to subsection (1A), where".

33. Powers of liquidator

Section 199 is amended -

(a) in subsections (1) and (2), by repealing "The" and substituting "Subject to section 193(3), the";

(b) by adding -

"(4) A provisional liquidator appointed under section 194 (1A) shall have power -

(a) to take into his custody or under his control all the property to which the company concerned is or appears to be entitled;

(b) subject to subsection (5), to sell or dispose of perishable goods or other assets (but not including derivatives, warrants, options, shares or choses in action) the estimated value of which is less than $100,000 and is likely to significantly diminish if they are not immediately sold or disposed of.

(5) A provisional liquidator appointed under section 194(1A) may, with the sanction of the court or the Official Receiver, exercise any power under subsection (1) or (2).

(6) No sale or disposal under subsection (4) (b)may be made to a person who is -

(a) a director, or shadow director within the meaning of section

168C, of the company concerned; or

(b) an associate, within the meaning of section 51B of the Bankruptcy Ordinance (Cap. 6), of the company or of any such director or shadow director,

unless the sale or disposal has the sanction of the court or of the Official Receiver.

(7) The Official Receiver shall not be personally liable for costs for any refusal to grant sanction under subsection (5) or (6).".

34. **Power of court to order winding up to be conducted as creditors' voluntary winding up**

Section 209A(6) is repealed and the following substituted -

"(6) Where an application is made under subsection (1) -

(a) the liquidator shall; and

(b) the Official Receiver may,

submit to the court a report with regard to the application.".

35. Appointment of special manager

Section 216(1) is amended by adding "or there are other grounds therefor," after "generally,".

36. Power to order public examination of promoters, directors, etc.

Section 222 is amended -

(a) in subsection (1) -

(i) by adding “or liquidator” after “Official Receiver”;

(ii) by repealing paragraph (b);

(b) in subsection (2), by adding “or liquidator, as the case may be,” after “Official Receiver”;

(c) in subsection (3), by repealing “liquidator, where the Official Receiver is not the liquidator” and substituting “Official Receiver or the liquidator, where he is not the party making the further report”;

(d) in subsection (6) -

(i) by repealing “Official Receiver’s” and substituting “further”;

(ii) in the proviso -

(A) by adding “or liquidator, as the case may be,” after “Official Receiver” where it first appears;

(B) by repealing “the Official Receiver” where it secondly appears and substituting “him”;

(C) by adding “or liquidator, as the case may be, after “Official Receiver” where it last appears.

37. Application of Ordinance to small winding up

Section 227F is amended -

(a) in subsection (1) -

(i) in paragraph (b), by adding "or the provisional liquidator" after "Official Receiver";

(ii) in paragraph (i), by adding "or the provisional liquidator, as the case may be," after "Official Receiver";

(iii) in paragraph (ii), by repealing "Official Receiver" and substituting "liquidator";

(b) in subsection (2), by repealing "Official Receiver" and substituting "liquidator".

38. **Circumstances in which company may be wound up voluntarily**

Section 228 (1) (d) is repealed.

39. **Special procedure for voluntary winding up in case of inability to continue its business**

Section 228A is repealed.

40. Commencement of voluntary winding up

Section 230 is amended by repealing "Except as provided in section 228A(3) (a), a" and substituting "A".

41. Notice by liquidator of his appointment

Section 253 (3) is repealed.

42. Interest on debts

Section 264A is amended -

(a) in subsection (1), by adding “the taxed costs of the petition and” after “on” where it first appears;

(b) in subsection (2) -

(i) by adding “the taxed costs of the petition and” after “interest on”;

(ii) by repealing “debt has” and substituting “taxed costs of the petition and the debt have”;

(iii) by repealing paragraph (b) and substituting -

“(b) a voluntary winding up, since the commencement of the winding up.”.

43. Extortionate credit transactions

Section 264B(2) (b) is repealed and the following substituted -

“(b) a voluntary winding up, since the commencement of the winding up.”.

44. Sections added

The following is added after section 295 -

"**Insolvent Trading**

295A. Interpretation

(1) In this section and sections 295B to 295G -

"company"（公司）means -

(a) a company within the meaning of section 2; or

(b) an unregistered company within the meaning of Part X (other than a partnership, whether limited or not or an association) -

(i) wherever incorporated;

(ii) carrying on business in Hong Kong or which has carried on business in Hong Kong; or

(iii) which is capable of being wound up under this Ordinance;

"former responsible person"（前任負責人）, in relation to a company, means a person who was formerly a responsible person of the company;

"insolvent trading"（在無力償債情況下營商）, in relation to a company, means the company falls within any of the criteria specified in Part 1 of the Nineteenth Schedule;

"responsible person"（負責人）, in relation to a company -

(a) means -

(i) a director or shadow director of the company; or

(ii) a manager of the company who is involved to a substantial or

material degree in directing the company's business or affairs;

(b) does not include a person who is a provisional supervisor or former provisional supervisor of the company except, in the latter case, a former provisional supervisor who is a person referred to in paragraph (a);

"shadow director"（影子董事）, in relation to a company, means a person in accordance with whose directions or instructions 1 or more directors of the company are accustomed to act but a person shall not be considered to be a shadow director by reason only that 1 or more of the directors of the company act on advice given by him in a professional capacity.

(2) For the purposes of sections 295B to 295G, a company goes into liquidation -

(a) if it passes a resolution for a creditors' voluntary winding up; or

(b) an order for its winding up is made by the court.

(3) The Secretary for Financial Services may, by notice in the Gazette, amend Part 1 of the Nineteenth Schedule.

295B. Liquidator may make application to court to seek declaration that responsible person, etc. is liable for insolvent trading

Where -

(a) a company goes into liquidation; and

(b) the liquidator of the company is satisfied that the company engaged in insolvent trading, the liquidator may make an application to the court to declare that a responsible person or former responsible person is liable for insolvent trading.

295C. Grounds on which court may declare responsible person, etc. liable for insolvent trading

(1) The court shall declare a responsible person or former responsible person liable for insolvent trading if, but only if, it is satisfied that -

(a) the company engaged in insolvent trading;

(b) the company incurred debt -

(i) when it engaged in insolvent trading; and

(ii) on or after the date on which this section came into operation;

(c) the responsible person or former responsible person was a responsible person at the time that the debt was so incurred; and

(d) either -

(i) the responsible person -

(A) knew or ought reasonably to have known the company was insolvent; or

(B) knew or ought reasonably to have known that there was no reasonable prospect that the

company could avoid becoming insolvent; or

(ii) there were reasonable grounds for suspecting that -

(A) the company was insolvent; or

(B) there was no reasonable prospect that the company could avoid becoming insolvent,

and the responsible person failed to take any steps to prevent the debt referred to in paragraph (b) from being incurred.

(2) Where, but for this subsection, the court would make a declaration under subsection (1) in respect of a responsible person or former responsible person, it shall not make such a declaration -

(a) if that person -

(i) was, at the time the debt referred to in subsection (1) (b) was incurred, a responsible person by virtue of paragraph (a) (ii) of the definition of “responsible person” in section 295A(1); and

(ii) satisfies the court that, before such debt was incurred, he issued a notice, in the form specified in Part 2 of the Nineteenth Schedule -

(A) to the board of directors of the company;

(B) stating that the company is engaging in, or is about to engage in, insolvent trading; and

(C) to which was attached a copy of section 295B; or

(b) if that person satisfies the court that, after the requirement referred to in subsection (1) (d) (i) was first satisfied in relation to him, he took every step with a view to minimizing the potential loss to the company's creditors as he ought to have taken.

(3) For the purposes of subsections (1) and (2), the facts which a responsible person (including a former responsible person at the time he was a responsible person) ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having -

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same duties as are discharged by that responsible person in relation to the company; and

(b) the general knowledge, skill and experience that that responsible person has.

(4) The reference in subsection (3) to duties discharged in relation to the company by a responsible person (including a former responsible person at the time he was a responsible person) includes any duties which he does not discharge but which have been entrusted to him.

(5) The Official Receiver may, by notice in the Gazette, amend Part 2 of the Nineteenth Schedule.

295D. Presumption of continued insolvency in certain circumstances

(1) Subject to subsection (2), where in any proceedings under section 295C it is shown to the satisfaction of the court that the company, on any date within the 12 months period immediately preceding the date of commencement of the winding up of the company -

(a) was insolvent; or

(b) contravened section 121 (1) or (3A) (and whether or not any person was convicted of an offence in respect of the contravention),

then it shall be presumed in those proceedings, unless the contrary is shown, that the company remained insolvent from the first-mentioned date to and including the second - mentioned date.

(2) Subsection (1) shall not apply in the case of -

(a) a contravention of section 121 (1) or (3A) where the court is satisfied that the contravention -

(i) is minor or of a technical nature; and

(ii) did not materially distort the books of account of the company; or

(b) a contravention of section 121(3A) where the court is satisfied that the responsible person or former responsible person concerned -

(i) took all reasonable steps to secure compliance by the company with that section; or

(ii) has not -

(A) by his own wilful act been the cause (whether in whole or in part) of the contravention; and

(B) aided, abetted, counselled or procured the contravention.

295E. Compensation, etc.

(1) Where the court makes a declaration under section 295C(1) in respect of a responsible person or former responsible person, it may -

(a) order the person to pay such compensation to the company as the court thinks proper in all the circumstances of the case;

(b) if it is satisfied that a creditor's claim against the company arose at a time when the creditor knew the company was engaging in insolvent trading, order that the compensation

shall not be used to satisfy that claim until all other claims by creditors against the company have been satisfied.

(2) Compensation to be paid under subsection (1) (a) to the company may include all or part of the costs of the liquidator of the company arising from seeking the declaration under section 295C(1) to which the order relates.

(3) Compensation to be paid under subsection (1)(a) to the company shall be used by the liquidator of the company in the following order of priority -

(a) first, any costs of the kind referred to in subsection (2) (and whether or not the compensation includes all or part of any such costs);

(b) secondly, the costs of the liquidation of the company in accordance with the Companies (Winding-up) Rules (Cap. 32 sub. leg.);

(c) thirdly, claims of creditors of the company in accordance with their priority unless the court orders a different priority.

295F. Enforcement of order for compensation

An order under section 295E(1)(a) shall be enforceable in all respects as if it were a judgment of the court.

295G. Assignment of action to insolvent trading prohibited

The liquidator of the company shall not assign any cause of action for any insolvent trading engaged in by the company.".

45. General rules and fees

Section 296(1) is amended by adding "or to applications to the court under the provisions of Part IVB" after "companies".

46. Documents etc. to be delivered to Registrar by companies which establish a place of business in Hong Kong

Section 333(1) is amended -

(a) in paragraph (a), by repealing "and, if" and substituting "or, if";

(b) by repealing paragraph (d);

(c) in paragraph (f), by repealing "together with" and substituting "or";

(d) in the proviso -

(i) in paragraph (i), by adding "a solicitor corporation, a corporate practice within the meaning of section 2 of the Professional Accountants Ordinance (Cap. 50) or" after "other than";

(ii) in paragraph (ii) -

(A) by adding "a solicitor corporation, such a corporate practice or" after "in the case of";

(B) by adding “solicitor corporation, corporate practice or” after “name of the”.

47. Continuing obligation in respect of authorized representative

Section 333A(2) is amended by repealing “and (d)”.

48. Return to be delivered to Registrar where documents, etc. altered

Section 335(1) is amended by repealing “and, in respect of any change of the persons referred to in paragraph (c), a document complying with section 333(1) (d)”.

49. Accounts of oversea company

Section 336(5) is amended by repealing “there shall be annexed to it” and substituting “in lieu of that delivery there shall be delivered to the Registrar”.

50. Prohibition of partnerships with more than 20 members

Section 345 (2) (b) is repealed and the following substituted -

“(b) for the purpose of carrying on practice as a firm of certificated public accountants or public accountants and such firm is registered under the Professional Accountants Ordinance (Cap. 50);”.

51. Punishment of offences under this Ordinance

The Twelfth Schedule is amended –

(a) in the entry relating to section 190(5), in the second column, by repealing "Official Receiver" and substituting "liquidator";

(b) by adding -

"116BA(2)	Director or secretary failing to notify company's auditor of matters under section 116B	Summary	Level 3	-
168AI(2)	Director contravening prohibition not to discharge duty or exercise power as director	On indictment Summary	Level 6 and 2 years Level 4 and 6 months	
168AN(5)	Failing to comply with requirement of	Summary	Level 5	$300

	provisional supervisor of company to give information etc.			
168AW(4)	Failing to comply with requirement of supervisor of voluntary arrangement to give information, etc.	Summary	Level 5	$300” ;

(c) by repealing the entries relating to sections 228A(2), 228A(3A) (relating to subsection (3) (b)), 228A(3A) (relating to subsection (3) (c)) and 228A(4B).

52. Matters for determining unfitness of directors

The Fifteenth Schedule is amended, in Part II, by repealing paragraph 5(c).

53. Schedules added

The following are added -

"SEVENTEENTH SCHEDULE [s. 168ZD & Eighteenth Sch.]

CONTRACTS OR OTHER AGREEMENTS TO WHICH SECTION 168ZD(3) OF THIS ORDINANCE SHALL NOT APPLY

1. Currency or interest rate swap agreement.
2. Basis swap agreement.
3. Spot, futures, forward or other foreign exchange agreement.
4. Cap, collar or floor transaction.
5. Commodity swap.
6. Forward rate agreement.
7. Repurchase or reverse repurchase agreement.
8. Spot, futures, forward or other commodity contract and financial futures contract.
9. Agreement to buy, sell, borrow, or lend securities, to clear or settle securities transactions or futures contracts or to act as a depository for securities.
10. Derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in any of items 1 to 9.
11. Master agreement in respect of any agreement or contract referred to in any of items 1 to 10.
12. Guarantee of the liabilities under an agreement or contract referred to in any of items 1 to 11.

EIGHTEENTH SCHEDULE [ss. 168ZF & 168ZG]

DUTIES AND POWERS OF PROVISIONAL SUPERVISOR OF COMPANY

PART 1

DUTIES OF PROVISIONAL SUPERVISOR

1. As soon as practicable, take into custody or under control all the property to which the company is or appears to be entitled.

2. Investigate and assess the affairs, business and property, and financial circumstances, of the company. 3.As soon as practicable after complying with paragraph 2, decide whether or not any of the relevant purposes are capable of being achieved.

4. If it is decided that any of the relevant purposes are capable of being achieved, prepare the proposal to achieve any such purpose or purposes.

5. During the moratorium do all things necessary to protect the property of the company.

6. During the moratorium, manage the affairs, business and property of the company for the primary purpose of preserving the property of the company for the creditors of the company as a whole.

7. Apply the company's trust fund, if any, referred to in section 168ZA(c) (iv) for the purpose referred to in section 168ZA(c) (iv) (II).

8. Subject to paragraphs 1 to 7, act in the supervision of the company in the best interests of the company.

9. Discharge such other duties as may be imposed on the provisional supervisor of the company by this or any other Ordinance.

10. Do such other things as may be necessary for the supervision and management of the affairs, business and property of the company.

PART 2

POWERS OF PROVISIONAL SUPERVISOR

1. Power to appoint any agent or employ any person to do any business and to dismiss the agent or employee.

2. Power to appoint a solicitor, professional accountant or other professionally qualified person to assist in the discharge of duties and the exercise of powers and to dismiss the solicitor, professional accountant or other professionally qualified person.

3. Power to do all acts and execute in the name and on behalf of the company any deed, receipt or other document.

4. Power to use the company seal and chop.

5. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company.

6 Power to make any payment which is necessary or incidental to the discharge of any duty.

7. Power to raise or borrow money and grant security over the property of the company.

8. Power to make any compromise or arrangement on behalf of the company.

9. Power to disclaim onerous contracts or agreements, excluding contracts or agreements specified in the Seventeenth Schedule (and, for the purposes of such power, section 59 of the Bankruptcy Ordinance (Cap. 6) shall, with all necessary modifications, apply to and and in relation thereto).

10. Power to form a committee of relevant creditors.

11. Power to exercise such other powers as may be conferred upon the provisional supervisor of the company by this or any other Ordinance.

12. Power to do all things incidental to his duties.

NINETEENTH SCHEDULE [ss. 295A & 295C]

CRITERIA APPLICABLE TO INSOLVENT TRADING AND NOTICE OF INSOLVENT TRADING

PART 1

CRITERIA FOR DETERMINING WHETHER COMPANY TRADES WHILE INSOLVENT

1. The company is unable to pay its debts as and when they become due and owing.

PART 2

NOTICE OF INSOLVENT TRADING BY RESPONSIBLE PERSON
OF COMPANY TO BOARD OF DIRECTORS

NOTICE OF INSOLVENT TRADING UNDER SECTION 295C(2) (a) (ii)
OF COMPANIES ORDINANCE (CAP. 32)

To: The board of directors of

_____

(name of company)

From: _____

(name of responsible person of company)

I hereby advise that the company is *engaging in/about to engage in insolvent trading. A copy of section 295B of the Companies Ordinance is attached.

Dated this day of 20 .

_____

(signature of responsible person)

* Delete whichever is inapplicable.".

54. Consequential and other amendments and transitional provisions

(1) The enactments specified in the Schedule are amended as set out in the Schedule.

(2) The provisions of sections 190, 191, 192, 194, 195, 196, 199, 209A(6), 216, 222, 227F, 264A and 264B, the Companies (Fees and Percentages) Order (Cap. 32 sub. leg.), and the Companies (Winding-up) Rules (Cap. 32 sub. leg.), as amended by this Ordinance, shall apply to and in relation to a company in respect of which proceedings for its winding up have commenced but not been concluded before the commencement of this section as those provisions apply to and in relation to a company in respect of which proceedings for its winding up have commenced on or after the commencement of this section.

SCHEDULE [s. 54]

CONSEQUENTIAL AND OTHER AMENDMENTS

Companies (Fees and Percentages) Order

1. **Paragraph 7 amended**

Paragraph 7(3) of the Companies (Fees and Percentages) Order (Cap. 32 sub. leg.) is amended by repealing “9 of Schedule 3” and substituting “3 of Schedule 2”.

2. **Schedule 2 amended**

Schedule 2 is amended -

(a) by repealing item 2;

(b) by adding -

“3. On an application for release by a liquidator for

every $1,000 or fraction of $1,000 of the gross amount

of assets realized and brought to credit ..... $5.00 -".

3. **Schedule 3 amended**

Schedule 3 is amended, in Table A -

(a) in item 3, by repealing "committee of inspection" and substituting "liquidator";

(b) by repealing item 9;

(c) by adding -

"10. On proof of debt above $250 (other than a

proof for workmen's wages) ..... 40.00".

This fee includes administering oath and filing. No

fee is payable on a proof for $250 or under.

Companies (Winding-up) Rules

4. **Interpretation of terms**

Rule 2 of the Companies (Winding-up) Rules (Cap. 32 sub. leg.) is amended by repealing the definition of "liquidator".

5. **Copies of documents filed in proceedings to be served on Official Receiver and Chief Bailiff**

Rule 23A is amended by adding “and the Chief Bailiff” after “Official Receiver”.

6. **Administration of small liquidations**

Rule 27A is amended -

(a) in paragraph (1), by repealing “(6)” and substituting “(5)”;

(b) in paragraph (2), by repealing “Official Receiver” and substituting “liquidator”;

(c) by repealing paragraph (6).

7. **Drawing up and contents of winding-up order**

Rule 35(2) is amended by adding”, provisional liquidator or liquidator” after “Official Receiver” where it twice appears.

8. **Preparation of statement of affairs**

Rule 39 is amended -

(a) in paragraph (1), by repealing “Official Receiver” wherever it appears and substituting “provisional liquidator or liquidator”;

(b) in paragraph (2), by adding”, provisional liquidator or liquidator” after “Official Receiver” wherever it appears.

9. **Extension of time for submitting statement of affairs**

Rule 40 is amended by repealing “Official Receiver” and substituting “provisional liquidator or liquidator”.

10. **Information subsequent to statement of affairs**

Rule 41 is amended -

(a) by repealing “to the Official Receiver” and substituting “to the provisional liquidator or liquidator”;

(b) by adding”, provisional liquidator or liquidator” after “Official Receiver” where it secondly and last appears.

11. **Default**

Rule 42 is amended by repealing “Official Receiver” and substituting “provisional liquidator or liquidator”.

12. **Expenses of statement of affairs**

Rule 43 is amended by repealing “Official Receiver” where it twice appears and substituting “provisional liquidator or liquidator”.

13. **Dispensing with statement of affairs**

Rule 44(1) is amended by repealing “Official Receiver” and substituting “provisional liquidator or liquidator”.

14. **Appointment of liquidator on report of meetings of creditors and contributories**

Rule 45(2), (3) and (4) is amended by repealing “Official Receiver” wherever it appears and substituting “provisional liquidator”.

15. **Report of liquidator to be filed**

Rule 49 is amended by adding “or liquidator” after “Official Receiver” where it twice appears.

16. **Appointment of time for consideration of report**

Rule 50 is amended by adding “or liquidator” after “Official Receiver”.

17. **Consideration of report**

Rule 51 is amended by repealing “Official Receiver shall” and substituting “party who made the further report shall, and the Official Receiver or the liquidator when he is not the party who made the further report may,”.

18. **Application for day for holding examination**

Rule 53 is amended by adding “or liquidator, as the case may be,” after “Official Receiver”.

19. **Appointment of time and place for public examination**

Rule 54 is amended by adding “or liquidator, as the case may be,” after “Official Receiver”.

20. **Notice of public examination to creditors and contributories**

Rule 55(1) is amended by adding “or liquidator, as the case may be,” after “Official Receiver” where it twice appears.

21. **Default in attending**

Rule 56(1) is amended by adding “or liquidator” after “Official Receiver”.

22. **Rule added**

The following is added -

“57A. Application of certain rules where report is made under section 168IA of Ordinance

Where a report under section 168IA of the Ordinance is made to the court by the Official Receiver, rules 49 to 54 and 56 and 57 inclusive shall apply to and in relation to the proceedings arising from the report.”.

23. **Application by or against delinquent directors, officers and promoters**

Rule 58(1) (c) is amended by repealing “157E or 157F” and substituting “168I”.

24. **Depositions of private examinations**

Rule 62(1) is amended by repealing “may attend in person, or by an assistant official receiver” and substituting “or liquidator may attend in person”.

25. **Provisional liquidator’s powers**

Rule 99 is amended by repealing “Official Receiver” and substituting “provisional liquidator”.

26. **First meetings of creditors and contributories**

Rule 106 is amended by repealing “Official Receiver” and substituting “provisional liquidator”.

27. **Notice of first meetings**

Rule 107 is amended by repealing “Official Receiver” and substituting “provisional liquidator”.

28. **Notice of first meetings to officers of company**

Rule 110 is amended by repealing “Official Receiver” wherever it appears and substituting “provisional liquidator”.

29. **Summary of statement of affairs**

Rule 111(1) is amended by repealing “Official Receiver” where it twice appears and substituting “provisional liquidator or liquidator”.

30. **Heading amended**

The heading before rule 112 is amended by repealing", INCLUDING A WINDING UP UNDER SECTION 228A".

31. **Creditors entitled to vote**

Rule 124(1) is amended -

(a) by repealing "Official Receiver" where it first appears and substituting "liquidator";

(b) by repealing "Official Receiver or".

32. **Heading amended**

The heading before rule 131 is amended by repealing", INCLUDING A WINDING UP UNDER SECTION 228A".

33. **Lodgment of proxies**

Rule 139 is amended -

(a) in paragraph (1), by repealing "Official Receiver" and substituting "liquidator";

(b) in paragraph (2), by repealing "Official Receiver or".

34. **Remuneration of liquidator**

Rule 146(2) is amended by repealing "the court shall otherwise order" and substituting "otherwise provided for under the Ordinance or ordered by the court".

35. **Discharge of costs before assets handed to liquidator**

Rule 153 is amended -

(a) in paragraph (1) -

(i) by adding “or under the Ordinance” after “appointed by the court”;

(ii) by repealing “Official Receiver” where it secondly and thirdly appears and substituting “provisional liquidator”;

(iii) in the proviso -

(A) by repealing “Official Receiver” where it first appears and substituting “provisional liquidator”;

(B) by adding “and provisional liquidator” after “Official Receiver” where it secondly and last appears;

(b) in paragraphs (2) and (3), by adding “and provisional liquidator” after “Official Receiver”.

36. **Record of proceedings**

Rule 158 is amended by repealing “Official Receiver, until a liquidator is appointed” and substituting “provisional liquidator, until a liquidator is appointed under the Ordinance or”.

37. **Cash book**

Rule 159(1) is amended by repealing "Official Receiver, until a liquidator is appointed" and substituting "provisional liquidator, until a liquidator is appointed under the Ordinance or".

38. **Lodgment of bill**

Rule 171 is amended by repealing "Official Receiver" where it twice appears and substituting "provisional liquidator".

39. **Costs payable out of the assets**

Rule 179(1) is amended -

(a) by adding "but excluding the interest on such costs" after "allowed by the court";

(b) by adding "and any fees, disbursements and expenses properly incurred by" before "the special";

(c) after the proviso, by adding "or under the Ordinance" after "winding up by the court" wherever it appears.

40. **Disposal of moneys received after execution**

Rule 207(2) is amended by repealing "or of a declaration made under section 228A of the Ordinance having been delivered to the Registrar of Companies under that section".

41. **Forms**

The Appendix is amended -

(a) in Form 4 -

(i) by adding "(c)" after "[Name]" and after "[Address]";

(ii) by adding immediately below "he has no solicitor." the following -

"(c) The name and address of the petitioner and the solicitor, if any, to the petitioner should be stated.";

(b) in Form 9, in the Note, by adding "*or provisional liquidator*" after "*Official Receiver*" where it twice appears;

(c) in Form 14 -

(i) by repealing ", and that the Official Receiver, or as the case may be, be constituted provisional liquidator of the affairs of the company";

(ii) in the Note, by adding "*or provisional liquidator*" after "*Official Receiver*" where it twice appears;

(d) in Form 18 -

(i) by repealing "*Official Receiver*" where it first appears;

(ii) by repealing "*Official Receiver*" where it secondly appears and substituting "*provisional liquidator*";

(iii) by repealing "*Note - If a liquidator is not appointed by the court the Official Receiver will be the liquidator*.";

(e) in Form 19 -

(i) by repealing "*Official Receiver*" where it first appears;

(ii) by repealing "*Official Receiver*" where it secondly appears and substituting "*provisional liquidator*";

(iii) by repealing "*Note - If a liquidator is not appointed by the court the Official Receiver will be the liquidator*.";

(f) in Form 20 -

(i) by repealing "*Official Receiver*" where it first appears;

(ii) by repealing "*by the Official Receiver*";

(g) in Form 23 -

(i) by repealing "as the Official Receiver" and substituting "as the liquidator";

(ii) in Note (2), by repealing "Official Receiver" and substituting "liquidator";

(h) in Form 25 -

(i) by repealing "Official Receiver and";

(ii) by repealing "of the Official Receiver" where it twice appears and substituting "of the provisional liquidator";

(i) in Forms 29, 30, 31 and 32, by adding "or liquidator, as the case may be," after "Official Receiver" wherever it appears;

(j) in Form 38A, by repealing "and Liquidator of the above-named company" and substituting "or Liquidator of the above-named company, as the case may be";

(k) in Form 63A -

(i) by repealing "**to the Official Receiver**" and substituting "**to the provisional liquidator**";

(ii) by repealing "with the Official Receiver" and substituting "with the liquidator";

(l) in Form 63B, by repealing "**Official Receiver**" and substituting "**provisional liquidator**".

Companies (Disqualification Orders) Regulation

42. **Interpretation**

Section 1 of the Companies (Disqualification Orders) Regulation (Cap. 32 sub. leg.) is amended by repealing the definitions of "court" and "disqualification order".

43. **Officers of court to furnish particulars to Registrar**

Section 3(1) is amended by adding -

"(aa) where a disqualification order is made by the Tribunal within the meaning of section 2 of the Securities

(Insider Dealing) Ordinance (Cap. 395), the clerk to the Tribunal;".

44. **Schedule 1 amended**

Schedule 1 is amended -

(a) by repealing -

"(1) Section of the Companies Ordinance under which the order was made+ -

Section 168E	
Section 168F	
Section 168G	
Section 168H	
Section 168J	
Section 168L	

"

and substituting -

"(1) Section of the Companies Ordinance ("CO") or Securities (Insider Dealing) Ordinance ("SIDO") under which the order was made+ -

Section 168E of CO	
Section 168F of CO	
Section 168G of CO	
Section 168H of CO	
Section 168J of CO	
Section 168L of CO	
Section 23(1)(a) of SIDO	
Section 24(1) of SIDO	

".

45. **Schedule 2 amended**

Schedule 2 is amended, in item (7), by adding -

"

Provisional supervision of company	
Supervision of voluntary arrangement in respect of company	

"

after -

"

Receivership or management of the property of the company	

"

46. **Schedule 3 amended**

Schedule 3 is amended by adding "or the Securities (Insider Dealing) Ordinance (Cap. 395)" after "Companies Ordinance".

Companies (Reports on Conduct of Directors) Regulation

47. **Reports required under section 168I(3) of the Ordinance**

Section 2(1) of the Companies (Reports on Conduct of Directors) Regulation (Cap. 32 sub. leg.) is amended by adding, before paragraph (a) -

"(aa) the provisional supervisor of a company;

(ab) the supervisor of a voluntary arrangement in respect of a company;".

48. **Return by office-holder**

Section 3 is amended -

(a) in subsection (1), by adding "the provisional supervisor of a company as mentioned in section 2(1)(aa)," after "appears to";

(b) in subsection (4) -

(i) by adding before paragraph (a) -

"(aa) in the case of the provisional supervisor, the date of his appointment taking effect;";

(ii) by repealing paragraph (b).

49. **Schedule amended**

The Schedule is amended -

(a) in Form D1 -

(i) by adding "UNDER *PROVISIONAL SUPERVISOR/ SUPERVISOR OR" after "INSOLVENT COMPANY";

(ii) by adding "appointment of provisional supervisor/appointment of supervisor/" after "Date of *";

(iii) by adding "provisional supervisor/ supervisor/" after "Name of *";

(iv) by adding "Provisional Supervisor's/ Supervisor's/" before "Liquidator's/ Receiver's address";

(v) by adding "provisional supervisor/ supervisor/" after "I am the *";

(vi) by adding "Provisional Supervisor's/ Supervisor's/" before "Liquidator's/ Receiver's signature" wherever it appears;

(vii) in Annex B, in item 15(a), by repealing "liquidator or receiver" and substituting

"provisional supervisor of that company, the supervisor of a voluntary arrangement in respect of that company, or the liquidator or receiver";

(b) in Form D2 -

(i) by adding "UNDER *PROVISIONAL SUPERVISOR OR" after "INSOLVENT COMPANY";

(ii) by adding "appointment of provisional supervisor/" after "Date of *";

(iii) by adding "provisional supervisor/" after "Name of *";

(iv) by adding "Provisional Supervisor's/" before "Liquidator's" where it twice appears.

Companies (Disqualification of Directors)

Proceedings Rules

50. Service and acknowledgment

Rule 6(4)(a) of the Companies (Disqualification of Directors) Proceedings Rules (Cap. 32 sub. leg.) is amended -

(a) in subparagraph (i) -

(i) by adding", provisional supervisor" after "officer";

(ii) by adding "the supervisor of a voluntary arrangement in respect of the company or" after "neither was he";

(b) in subparagraph (ii), by repealing "liquidator" and substituting "provisional supervisor, liquidator, supervisor".

Employees Compensation Assistance Ordinance

51. Meaning of "Insolvent"

Schedule 2 to the Employees Compensation Assistance Ordinance (Cap. 365) is amended, in paragraph (a)(v), by repealing "or a winding up of the insurer has commenced pursuant to section 228A of the Companies Ordinance (Cap. 32)".

Securities (Insider Dealing) Ordinance

52. Section substituted

Section 29 of the Securities (Insider Dealing) Ordinance (Cap. 395) is repealed and the following substituted -

"29. Registration, etc. of Tribunal orders

(1) An order of the Tribunal may be registered by the Tribunal, in such manner as may be prescribed, in the Court of First Instance and shall, on such registration, become for all purposes an order of the Court of First Instance made within the jurisdiction of the Court of First Instance.

(2) An order of the Tribunal under section 23(1)(a) or 24(1) shall be filed by the Tribunal -

(a) with the Registrar within the meaning of section 2 of the Companies Ordinance (Cap. 32); and

(b) as soon as is reasonably practicable after the order is made.".

Securities and Futures (Clearing Houses) Ordinance

53. Right of relevant office-holder to recover certain amounts arising from certain transactions

Section 11(2) of the Securities and Futures (Clearing Houses) Ordinance (Cap. 420) is amended, in the definition of "prescribed event", by repealing paragraph (b).

Administrative Appeals Board Ordinance

54. Schedule amended

The Schedule to the Administrative Appeals Board Ordinance (Cap. 442) is amended by adding -

"47. Companies Ordinance (Cap. 32)	A decision of the Official Receiver under section 168W to refuse to appoint a professional accountant or solicitor to be a member of the panel.".

Mandatory Provident Fund Schemes (General) Regulation

55. Approved trustee to notify Authority of events of significant nature

Section 62(3)(a) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg.) is amended by adding "the appointment of a provisional supervisor, within the meaning of Part IVB of the Companies Ordinance (Cap. 32), of the approved trustee," before "the winding-up".

Mandatory Provident Fund Schemes (Exemption) Regulation

56. Minimum standards applicable to trustees, etc. of schemes

Schedule 3 to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485 sub. leg.) is amended, in section 7(5), by adding "retirement or" after "approves the".

Explanatory Memorandum

The principal purpose of this Bill is to amend the Companies Ordinance (Cap. 32) to give effect to the recommendations contained in the Report on Corporate Rescue and Insolvent Trading issued by the Law Reform Commission of Hong Kong (see new Part IVB at clause 24 and new sections 295A to 295G at clause 44).

2. clauses 3, 7, 8, 9(b), 10(a) and (b)(ii), 11, 15, 46, 47, 48 and 49 make technical amendments to sections 21, 57B, 64A, 107, 109, 110, 157D, 333, 333A, 335 and 336 respectively to reduce the documents required to be filed by local and oversea companies and their directors.

3. Clause 9(a) amends section 107 to simplify the filing requirement of the first annual return of a private company having a share capital. The simplification is that the date of filing of that return is no longer linked to the date of the company's first annual general meeting.

4. Clause 10(a) amends section 109 to repeal spent transitional provisions.

5. Clause 14 repeals section 116B and adds new sections 116B, 116BA and 116BB. There is doubt that the existing section 116B enables a company to pass a resolution without holding a meeting provided all the shareholders agree. This doubt is removed by new section 116B which states specifically that anything which may be done by a company by resolution of the company in general meeting may be done, without a meeting and without any previous notice being required, by a written resolution signed by or on behalf of all the members who at the date of the resolution would be entitled to attend and vote at the meeting. New section 116BA requires a director or secretary of a company to notify the company's auditors of a resolution falling within new section 116B. New section 116BB contains provisions supplementary to new sections 116B and 116BA. Clauses 4, 5, 6, 12, 13 and 51 make consequential amendments to sections 47E, 49D, 49K, 111 and 113(1) and the Twelfth Schedule respectively.

6. Clause 20 introduces a new section 168IA to empower the Official Receiver to conduct a public examination in court of the promoters or directors of a company which has been wound up by the court.

7. Clause 23 amends section 168R to include an order of the Insider Dealing Tribunal under section 23(1)(a) or 24(1) of the Securities (Insider Dealing) Ordinance (Cap. 395) in the definition of "disqualification order". The Schedule to the Bill makes consequential amendments to the Companies (Disqualification Orders) Regulation (Cap. 32 sub. leg.) and the Securities (Insider Dealing) Ordinance (Cap. 395).

8. Clause 24 adds new Part IVB (new sections 168U to 168ZZA) to enable a company in financial difficulty to be put into the hands of a provisional supervisor for the purpose of the provisional supervisor preparing a proposal to creditors of the company for a voluntary arrangement in respect of the company. If that proposal is accepted by the creditors, then the voluntary arrangement is put into effect under a supervisor of the arrangement. If that proposal is rejected by the creditors, then the company is wound up as a creditors' voluntary winding up.

9. New section 168U(1) defines the terms used in new Part IVB. The definitions of "provisional supervisor", "relevant creditor", "relevant date", "relevant meeting of creditors" and "voluntary arrangement" should, in particular, be noted. New section 168U (2) and (3) make it clear that more than one person may be appointed to be the provisional supervisor of a company or the supervisor of a voluntary arrangement in respect of a company. New section 168V specifies the companies to which new Part IVB shall apply. It should be noted that the Part does not, inter alia, apply to banks, restricted licence banks or deposit-taking companies, as the provisions of the Banking Ordinance (Cap. 155) govern such institutions.

10. New Section 168W empowers the Official Receiver to appoint a panel of professional accountants and solicitors. Apart from the exceptions given at new sections 168X(a)(ii) and 168ZW(1)(a)(ii), no person may be appointed to be the provisional supervisor of a company or the supervisor of a voluntary arrangement except a member of the panel. New section 168Y specifies the persons who may appoint the provisional supervisor of a company. (For example, the directors of the company or a liquidator of the company). However, new section 168Z provides that those persons shall not appoint a provisional supervisor unless they are satisfied there is a reasonable likelihood that 1 or more of the purposes specified in new section 168Z(1)(a), (b), (c) or (d) could be achieved. (Such a purpose is defined in new section 168U(1) as a "relevant purpose"). New sections 168ZA, 168ZB and 168ZC require certain documents relating to the appointment of a provisional supervisor of a company to be filed with the Official Receiver, the Registrar of Companies and the High Court Registry, a notice of the appointment to be published in the Gazette, and notices to be published in newspapers inviting creditors of the company to give notice to the provisional supervisor of their claims against the company.

11. New section 168ZD is of particular importance as it provides for a stay of proceedings against a company (for example, applications for winding up the company or for enforcing security over the company's property) whilst the company is under the control of the provisional supervisor. (This stay of proceedings is defined as "moratorium" in new section 168U(1)). The provisional supervisor is thus granted a "breathing space" whilst

he attempts to prepare the proposal. The moratorium expires after 30 days unless it is extended by the court or a resolution of creditors of the company. (New sections 168ZD(7), 168ZQ(4) (iii) and 168ZQ(2) specify the other circumstances in which the moratorium shall cease). New section 168ZD(9) specifies the creditors who are exempt from the moratorium. (These are creditors in respect of whom the provisional supervisor has entered into a separate arrangement, or whom the court has exempted on the ground of significant financial hardship under new section 168ZE(4)). New section 168ZE(2) empowers the court to extend the moratorium on specified grounds.

12. New sections 168ZF and 168ZG, together with the new Eighteenth Schedule at clause 53, set out the duties and powers of the provisional supervisor. New section 168ZH empowers the provisional supervisor to delegate his duties and powers, but only to a director of the company. New section 168ZI states that the effect of the moratorium on the directors of the company are that they are prohibited from discharging a duty or exercising a power in their capacity as directors except pursuant to a delegation from the provisional supervisor. (The latter will have all the duties and powers of a director). New sections 168ZJ and 168ZK specify the effect of the moratorium on contracts, in particular contracts of employment. It should be noted that where the provisional supervisor accepts a pre-existing contract of employment, or enters into a new contract of employment, the wages, salaries and other emoluments thereby payable have priority even over the provisional supervisor's remuneration. (See new section 168ZK(2)).

13. New section 168ZL provides an indemnity for, inter alia, the remuneration and fees, costs and charges of the provisional supervisor. The indemnity is secured by way of a lien over the company's property. New section 168ZM provides that the provisional supervisor is, subject to certain exceptions, entitled to remuneration in accordance with a scale of fees approved by the Official Receiver.

14. New section 168ZN empowers the provisional supervisor to require a specified person (see the definition of "specified person" in new section 168ZN (6)) to submit a statement of the affairs of the company, and to provide the provisional supervisor with such information about the business and financial circumstances of the company as the provisional supervisor may reasonably request.

15. New section 168ZO relates to the removal and resignation of the provisional supervisor, and to the appointment of a replacement provisional supervisor. It should be noted that the provisional supervisor can only be removed from office by the court for cause shown on the application of a creditor of the company who has the support in writing of not less than 50% in value of the total number of creditors.

16. New section 168ZP encourages the injection of fresh funds into the company as operating capital by giving those funds priority, in the event of the winding up of the company, over the debts of other creditors of the company. New section 168ZQ empowers a major creditor of the company (see definition of "major creditor" in new section 168ZQ(5)) to decide that he does not agree with the provisional supervisor proceeding to prepare the

proposal. If he so decides, then the moratorium ceases and the provisional supervisor vacates his office.

17. New sections 168ZR, 168ZS and 168ZT relate to relevant meetings of creditors called by the provisional supervisor and the resolutions passed or rejected at such meetings. (See the definition of "relevant meeting of creditors" in new section 168U(1)). Basically, there are 3 types of meeting - a meeting where the provisional supervisor submits the completed proposal for acceptance, modification or rejection by the creditors, a meeting to seek an extension of the moratorium so that the provisional supervisor may complete the proposal, and a meeting to resolve to wind up the company where the provisional supervisor has decided that none of the relevant purposes is capable of being achieved. It should be noted that if the creditors reject the proposal or refuse to extend the moratorium, then they may also resolve to wind up the company.

18. New section 168ZU specifies the consequences that ensue where the proposal has been approved at a relevant meeting of creditors. The provisional supervisor vacates office and a supervisor of the voluntary arrangement takes his place. (They may be the same person). It should be noted that all relevant creditors who received notice of the meeting are bound by the voluntary arrangement even if they declined to attend the meeting (see new section 168ZU(1)(b)(i)). New section 168ZV sets out the effect of the voluntary arrangement, in particular that no creditor of the company bound by the arrangement may commence or continue any winding up proceedings against the company or enforce any security over the company's property.

19. New section 168ZW relates to the supervisor of the voluntary arrangement and provides, in particular, that he must ascertain on behalf of creditors of the company that the arrangement is being adhered to and implemented in accordance with its terms. New section 168ZX empowers the court in certain circumstances to appoint the supervisor of the voluntary arrangement in substitution for an existing supervisor, or to fill a vacancy. New section 168ZY requires the supervisor of the voluntary arrangement to file a notice with, inter alia, the Official Receiver where he is a replacement supervisor or where the voluntary arrangement has ceased to have effect.

20. New section 168ZZ empowers the Official Receiver to specify forms, and new section 168ZZA empowers the Secretary for Financial Services to make regulations, for the purposes of new Part IVB. Clauses 16, 17, 18, 19, 45, 51(b) and 54 (together with the Schedule to the Bill) amend sections 168D(1), 168G(1)(b), 168H(2)(b), 168I, 296(1), the Twelfth Schedule and the Administrative Appeals Board Ordinance (Cap. 442) consequential to the provisions of new Part IVB.

21. Clause 30 amends section 194 to empower the Official Receiver, where he is the provisional liquidator of a company, to appoint a person as a provisional liquidator in his place. Clause 2(a) consequently amends section 2(1) to add a definition of the term "liquidator" so that the term includes a provisional liquidator holding such office by virtue of section 194 as amended. Other amendments consequential to the amendments made to section 194 are made by clauses 25, 26, 27, 28, 31, 32, 33, 36 and 37.

22. Clause 34 repeals and replaces section 209A(6) to relieve the Official Receiver from a mandatory obligation to submit a report under section 209A(1). Clause 35 amends section 216(1) to widen the grounds on which the court may appoint a special manager of a company.

23. Clause 39 repeals section 228A to remove the ability of the directors of a company by majority resolution to place the company into a creditors' voluntary winding up by appointing a provisional liquidator and delivering to the Registrar of Companies a statutory declaration made by one of the directors. Clauses 19(b)(i), 38, 40, 41, 42, 43 and 52 and the Schedule to the Bill make consequential amendments to sections 168I, 228, 230, 253, 264A and 264B, the Fifteenth Schedule and the Companies (Winding-up) Rules (Cap. 32 sub. leg.).

24. Clause 42 amends section 264A to, inter alia, make it clear that interest on the taxed costs of a petition for winding up is payable in accordance with that section as with interest on other proved debts, and not with the same priority as the taxed costs of the petition itself.

25. Clause 44 adds new sections 295A to 295G to empower the liquidator of a company to make an application to the court to declare that a responsible person or former responsible person is liable for insolvent trading. (See the definitions of "former responsible person", "insolvent trading" and "responsible person" in new section 295A(1) and the new Nineteenth Schedule at clause 53). The new provisions are based to some extent on sections 214 and 215 of the Insolvency Act 1986 of the U.K. (c. 45).

26. New section 295C(1) specifies the matters in respect of which the court must be satisfied before it may declare a responsible person or former responsible person liable for insolvent trading. New section 295C(2) provides defences to a declaration of insolvent trading under new section 295C(1). New section 295D provides for a presumption of continued insolvency from a date in the period of 12 months preceding the winding up of the company if it is shown to the satisfaction of the court that the company was insolvent on that date. New section 295E provides that where the court makes a declaration of insolvent trading in respect of a responsible person or former responsible person, it may order that person to pay to the company such compensation as the court thinks proper in all the circumstance of the case. New section 295E specifies how the compensation is to be applied. It should be noted that new section 295G prohibits the liquidator from assigning an action for insolvent trading. Clauses 21 and 22 consequentially amend sections 168L(1) and 168O to account for the new action of insolvent trading.

Annex B

SUMMARY OF REPORT ON CORPORATE RESCUE AND INSOLVENT TRADING ISSUED BY THE LAW REFORM COMMISSION OF HONG KONG

Provisional Supervision: (Chapters 1 and 3 of the Report)

1. At present, Hong Kong companies that get into financial difficulties may try to come to an arrangement with their creditors by means of a non-statutory arrangement or by means of the arrangement and reconstruction provisions under section 166 of the Companies Ordinance. The major deficiency of these arrangements is the lack of a moratorium (stay of proceedings) that can bind creditors while an arrangement plan is being formulated.

2. Provisional supervision leading to a voluntary arrangement would be a vehicle which would facilitate a company in avoiding winding up, to survive in whole or in part as a going concern, or satisfy its debts in whole or in part through a more advantageous realisation of the company's assets or a better return for creditors and members than would result from a winding up. These general purposes could be achieved in a variety of ways through voluntary arrangements; such as/by:

(a) an extension of time for payment of debts,
(b) a composition in satisfaction of its debts,
(c) the compromise of any claims against the company,
(d) the variation or the reordering of the rating for payment of its debts or any class of its debts,
(e) the conversion of its debts in whole or in part into shares or other securities to be issued by the company, or
(f) any other scheme or arrangement in relation to the affairs of the company.

3. Provisional supervision would:

(a) provide a solid basis on which to calculate the costs and time involved in putting a proposal to creditors.
(b) provide a flexible framework to allow a provisional supervisor to work under court protection from the outset.
(c) limit the costs of court appearances as the provisional supervisor would only have to go to court after 30 days and after that only when an extension of provisional supervision was sought or the company was deemed to be wound up as a creditors' voluntary winding up.
(d) set out the role of the provisional supervisor, give the provisional supervisor the power of management, prevent creditors from threatening proceedings as a form of leverage, permit super priority borrowing, allows creditors to vote on the proposal and provide a transition into a company voluntary arrangement or winding-up.
(e) provide certainty. Creditors could be sure that after not more than six months they would have their say on a proposal.

Benefits of provisional supervision

4. If a company can achieve a voluntary arrangement under supervision, there are good prospects that it can return to profitability. This is attractive to the shareholders, who generally have the lowest priority when it comes to the distribution of the assets of a company that has gone into liquidation from a winding up.

5. The preservation of jobs is of the utmost importance. For additional comment on employees see paragraph 19 below.

6. Unsecured creditors are often considered to have a raw deal in a liquidation. In the fours between 1991/92 and 1994/95 it took an average time of 5.12 years to pay an average rate of 27.78% first and final dividend to ordinary creditors.

7. It is not unusual for there to be multiple secured creditors with varying securities and priorities over the assets of a company. Because of the nature of floating charges in particular, which permit a company to deal with the assets covered by the floating charge in the ordinary course of business, the value of a company's assets can diminish, leaving some or all of the secured creditors under-secured.

Companies To Whom Provisional Supervision Would Apply (Chapter 2 of the Report)

8. The procedure should apply to companies formed and/or registered under Parts I and XI of the Companies Ordinance but excluding certain regulated industries. Provisional supervision would apply to both listed and unlisted companies. Companies registered under Part I of the Companies Ordinance account for most companies in Hong Kong, including both private and public companies. Part XI of the Companies Ordinance relates to companies incorporated outside Hong Kong, which are referred to in Part XI as "oversea companies".

9. The inclusion of oversea companies is important as Hong Kong is a major international trading, manufacturing and financial centre and there are a considerable number of international companies operating in Hong Kong in one form or another. Oversea companies operating in Hong Kong have the choice of forming a Hong Kong subsidiary under Part I of the Companies Ordinance or registering as an oversea company under Part XI.

Companies to whom the procedure would not apply

10. The procedure should not apply to industries that were already regulated by statute and which have provision for the relevant authority to assume control of the business or oblige a business to act in a certain manner. The regulatory powers of each industry differ substantially, according to their needs. Provisional supervision should not therefore be imposed on regulated industries but the relevant regulatory bodies should consider whether to apply a remedial procedure through their own legislation. The regulated industries recognised were banking, insurance and securities and futures.

Purposes Of Provisional Supervision (Chapter 3 of the Report)

11. A company should be able to go into provisional supervision whether it was able to pay its debts or not. A solvent company which recognised that it was trading into

difficulties should be able to avail itself of supervision. It would stand a better chance of a successful reorganisation than a company that continued trading until it was insolvent. It would be good management practice to act earlier rather than later in initiating provisional supervision.

Those Who May Initiate The Procedure (Chapter 4 of the Report)

12. In addition to the company or its directors, liquidators and receivers should be able to initiate, or give their consent to initiate, the procedure in appropriate circumstances. The intention is that whoever has power to initiate should do so from a position of knowledge of the company's financial position and prospects. It is for this reason that creditors should not be able to initiate the procedure.

The Moratorium (or Stay of Proceedings) : (Chapter 5 of the Report)

13. The moratorium should commence upon the filing of a resolution of the company or the board of directors and the consent of the provisional supervisor to act. The initial moratorium period should be for 30 days from the commencement of provisional supervision after which, if the provisional supervisor has not formulated a proposal for creditors, he may apply to the court for an extension or extensions.

14. The provisional supervisor need only apply to the court for an extension if he is unable to complete an arrangement plan within the initial 30 day period. After that, the court should grant an extension or extensions of 30 days or more. If the provisional supervisor reports that he is likely to be able to complete the plan but not within a further 30 days, the court should have the discretion to extend the moratorium for any period up to a maximum of six months from the commencement of the moratorium.

15. Eligible financial contracts, which occur in certain closed markets such as the central clearing and settlement system of the Stock Exchange of Hong Kong Limited, should be exempted from the moratorium.

16. At the end of six months, the court would cease to have any role in monitoring the provisional supervisor as regards extensions of the moratorium. If the creditors resolved to extend the moratorium beyond six months they could impose such conditions as they wished on the provisional supervisor relating to reviewing the extension.

17. If the court was satisfied that the moratorium was causing significant financial hardship to a creditor, the court could exempt that creditor from the moratorium and any voluntary arrangement and the moratorium would cease to apply to that creditor and the creditor would not be subject to any subsequent voluntary arrangement.

18. The provisional supervisor should have the power to exclude any class or classes of creditors from the moratorium, in which case the moratorium would cease to apply to them.

19. At present, employees who are laid off by a company that does not go into liquidation are not able to make a claim for compensation from the Protection of Wages on Insolvency Fund, as the Fund is only triggered by the winding-up of the company or by advice from Legal Aid that the company is unable to pay its debts. On a provisional supervision, employees could therefore be cut out and left without the prospect of any

interim payment from the Fund. It would be desirable for employees who have been laid off as a consequence of provisional supervision to be accommodated under the provisions of the Protection of Wages on Insolvency Ordinance. Until that happens, a provision similar to section 79 of the Companies Ordinance should be made to the effect that, where a provisional supervisor is appointed to a company the debts of employees which in every winding-up are preferential payments under section 265 of the Companies Ordinance, be paid in priority to all other debts according to their respective priorities under section 265, out of the assets coming into the hands of the provisional supervisor in priority to any other claim.

20. The moratorium should cease upon a resolution being passed either to terminate the provisional supervision or that the company should be would up or on the approval or rejection by creditors of a voluntary arrangement plan.

Initiating The Procedure (Chapter 6 of the Report)

21. A proposal for a voluntary arrangement should not have any effect until a resolution of the company or the board of directors proposing a voluntary arrangement, or, if appropriate, of the proposal of a liquidator in a compulsory winding up, a consent to act of the provisional supervisor, and an affidavit of the directors setting out the reasons for initiating provisional supervision, have been filed at both the Supreme Court Registry and the Companies Registry. The effect of the filing of the documents would be to put the company into provisional supervision, the commencement date being the date of last filing of the resolution and the consent to act.

22. The affidavit of the board of directors should set out the reasons for initiating provisional supervision and a declaration to the effect that in the opinion of the directors the interests of the company and creditors would be best served by the process of provisional supervision. The affidavit would be useful to the court in considering later applications for extensions of the moratorium and would also give some reassurance to the creditors.

Who May Be The Provisional Supervisor (Chapter 7 of the Report)

23. In most cases provisional supervisors should only be selected from a panel of practitioners which would be operated by the Official Receiver. In addition to appointment of provisional supervisors through a panel the court may approve the appointment of a person who was not on the panel but who was particularly suited to the task of rescuing a particular company. Once a provisional supervisor is appointed he would not only assume control of the company but would also be involved in the day to day business of the company in addition to formulating an arrangement plan.

Role Of The Provisional Supervisor (Chapter 8 of the Report)

24. If the provisional supervisor was to leave the day to day running of a company in the hands of the management and to limit himself with examining the records of the company and working behind the scenes to formulate a plan there would be a danger on two fronts. First, the provisional supervisor might fail to gain the confidence of the creditors if it was perceived that he was not in full control. Second, if a provisional supervisor did not have control over the management of a company, it would increase the

chances of a company's assets being dissipated by unscrupulous directors. It would not therefore be appropriate to allow management retain full control of a company and accordingly the provisional supervisor should have executive functions.

25. The functions of the provisional supervisor would be:

(a) to assess the financial position of the company, after which he should;
(b) decide whether or not any of the purposes of a voluntary arrangement were capable of being achieved;
(c) if he decided that any of the purposes of a voluntary arrangement were capable of being achieved, he should then formulate a plan to achieve the intended purpose;
(d) once he formulated a plan, he should submit it to a meeting or meetings of creditors for acceptance or otherwise by the creditors within the initial moratorium period in so far as that was possible;
(e) if the provisional supervisor, having assessed the financial position of the company, decided that none of the purposes of a voluntary arrangement were capable of being achieved he should call a meeting of creditors;
(f) if the provisional supervisor, having commenced the formulation of an arrangement plan, found that he was unable to complete the formulation of the plan, he should call a meeting of creditors to provide them with a final opportunity to come up with a plan to save the company or to resolve that the company should be wound up;
(g) during the provisional supervision period he should do all things necessary to protect the assets of the company;
(h) during the provisional supervision he should manage the affairs, business and property of the company with the primary purpose of preserving the assets of the company for the creditors as a whole;
(i) he should act in the best interests of the company;
(j) he should make a report to the Official Receiver if a director was or had been a director of a company which had at any time become insolvent whether while he was a director or subsequently and that his conduct as a director of that company, either taken alone or taken together with his conduct as a director of any other company or companies, made him unfit to be concerned in the management of a company.

Duties, Rights And Liabilities Of The Provisional Supervisor (Chapter 9 of the Report)

26. Subject to his overriding duty to supervise the affairs of the company and to carry out his functions, the provisional supervisor should be under a duty to do all things necessary to protect the assets of a company for the benefit of the creditors The provisional supervisor should have the right to approach the court for directions. The provisional supervisor should not be liable for any of the debts of the company which arose before his appointment.

27. The provisional supervisor should be entitled to such remuneration as would be agreed between him and whoever initiated the procedure and caused him to act. The level of the remuneration should be specified in a prescribed form in the consent to act.

Ascertaining The Company's Affairs (Chapter 10 of the Report)

28. When a provisional supervisor is appointed he will need to assimilate a great deal of information in a short time, including establishing the extent and whereabouts of the assets of the company and taking control of them. In order to achieve this, the provisional supervisor would need powers to require information to be put at his disposal without undue delay and for assistance to be afforded to him by those who had knowledge of the company's affairs. The provisional supervisor should therefore have the power to obtain a statement of affairs of the company from specified persons, including directors and employees, within a relatively short time after his appointment.

Removal And Resignation Of The Provisional Supervisor (Chapter 11 of the Report)

29. The provisional supervisor should only be capable of removal for cause shown.

30. The provisional supervisor should be able to resign without cause shown where a majority of the creditors and the provisional supervisor himself agree to such a course and another provisional supervisor agrees to be appointed to the position. Resignation should not otherwise be possible other than where a provisional supervisor died or through mental incapacity.

Super Priority (Chapter 12 of the Report)

31. Provision should be made for a company to borrow during provisional supervision and such borrowing should receive priority over all existing debts, with the exception of fixed charges. This is because, in all likelihood, a company in provisional supervision would need to raise capital to fund its operations during the provisional supervision period. Existing lenders should be given first refusal on any super priority lending the company may require. If existing lenders declined to provide the lending, the provisional supervisor should then be able to seek super priority lending from other sources. Super priority lending would apply only to funds provided for working capital for the company and these funds should not be used to discharge, in whole or in part, any liability of the company to the provider of the funds existing at the commencement of the provisional supervision period.

Secured Creditors (Chapter 13 of the Report)

32. Any substantial charge, whether it was fixed or floating, or a combination of both, should carry the right to elect whether to participate in provisional supervision The effect of an election not to participate and thus effectively end provisional supervision would return a company to the position it was in just a few days previously. Creditors, secured and unsecured, could take the usual forms of action. Other secured creditors, that is, holders of charges whose level of exposure or lending would not warrant a charge over the whole or substantially the whole of a company's assets, would be bound by a moratorium in the same way as unsecured creditors, and would not have the option to elect whether to participate in provisional supervision.

Procedures For Meetings Of Creditors (Chapter 16 of the Report)

33. Any meeting of creditors to consider any matter relating to provisional supervision, creditors should form one class. The quorum for any meeting of creditors should be one creditor present and entitled to vote. For any resolution to pass at a meeting of creditors approving a proposal, there should be a majority in number and in excess of two thirds in value of the creditors present in person or by proxy and voting on the resolution.

34. Where a voluntary arrangement plan is approved by creditors, the provisional supervision should cease and the terms of the voluntary arrangement should take effect. The voluntary arrangement would be binding on every creditor who was entitled to vote at a meeting at which the arrangement plan was approved, and on the company and its members.

Consequences Of The Approval Of A Voluntary Arrangement (Chapter 17 of the Report)

35. Even after a company enters into a voluntary arrangement it would need protection. It should be a condition of every voluntary arrangement that, while it was in effect, the parties to the voluntary arrangement should be prohibited from taking actions that would be to the detriment of the other parties to the arrangement; therefore:

(a) no creditor bound by the arrangement may commence or continue any winding up proceedings against the company;
(b) no resolution may be passed or made by the members or the directors of the company for the winding up of the company:
(c) no receiver of the company may be appointed by a creditor bound by the arrangement or, if already appointed, no receiver may exercise any powers incidental to the office;
(d) no creditor bound by the arrangement may take any step to enforce or continue to enforce any security over the company's property or to repossess goods in the company's possession;
(e) no creditor bound by the arrangement may commence any proceedings, execution, distress or other legal process against the company.

The Supervisor Of A Voluntary Arrangement (Chapter 18 of the Report)

36. The supervisor of a voluntary arrangement should only be capable of appointment from the Official Receiver's panel. In most cases he would probably be the provisional supervisor. A supervisor of a voluntary arrangement should perform such duties and functions and have such powers as may be specified in the arrangement and ascertain on behalf of the creditors that the arrangement was being adhered to and implemented by the company in accordance with its terms. The supervisor should supervise the arrangement having regard to the interests of the creditors of the company, the company itself and the shareholders of the company.

Insolvent Trading (Chapter 19 of the Report)

37. Directors of a company should be subject to liability for insolvent trading once a company traded while insolvent or if the company continued to trade when there was no reasonable prospect of preventing the company becoming insolvent. A lesser duty should be imposed on senior management of a company. Directors and senior management, collectively known as "responsible persons" would be liable to pay compensation to the company if they were found by the court to have failed in their respective duties. Insolvent trading provision should encourage responsible persons to face the fact that a company was slipping into insolvency and cause them to take action rather than to trade on regardless of the consequences.

38. Provisional supervision would be a civil remedy only; there should be no criminal element. There is no reason for making an application for insolvent trading unless a company had gone into insolvent liquidation as, in practical terms, if a company remained in business there would be no one, such as a liquidator, who would be in a position to form a view that insolvent trading had taken place. The power to make an application in respect of insolvent trading should vest in a liquidator only.

39. Insolvent trading should apply to all directors whether they were validly appointed directors, persons who held themselves out to be directors though they had not been validly appointed, and shadow directors. Liability for insolvent trading should not be collective and liquidators should take account of a director's actions prior to liquidation. The ability and expertise of a director should be taken into account. A responsible director should, therefore, be able to protect himself by showing that he had warned the board about insolvent trading and that he had opposed the course of action the company had taken which resulted in insolvent liquidation.

40. Senior management should be liable to pay compensation for insolvent trading if they failed to warn the board of directors that the company was trading into insolvency. Senior management's duty would be lower than that of directors as the power to wind-up a company voluntarily or to initiate provisional supervision would only lie in the board of directors. Liability should extend to those in management who would know, who ought to have known or who had reasonable grounds for suspecting that a company was insolvent or would become insolvent and failed to warn the board of directors of the situation.

41. As most companies operate on a cash flow basis and can readily establish whether a company is able to discharge its liabilities as they fall due the cash flow test is the basis on which liability should be founded.

42. In order for a liability for insolvent trading to arise certain factual conditions would have to be established. These are (i) that a director is or has been a director of an insolvent company at the time when the debt or debts were incurred and that (ii) the company was insolvent at that time or there was no reasonable prospect of avoiding becoming insolvent. A liquidator must then consider whether a director, at that time, (i) knew the company was insolvent, or (ii) ought to have known that the company was insolvent or would so become, or (iii) that there were reasonable grounds for suspecting that the company was insolvent or would become insolvent and failed to take action to prevent the company from incurring the debt. The third limb of the factual conditions refers to reasonable grounds for suspecting insolvency. A director would be considered to have suspicions if, (i) he was aware at the time that there were grounds for so suspecting, or (ii) if a director in a like position in a company, in the company's circumstances, would be so aware.

43. In determining whether warning was given in good time the same factual conditions as set out above in respect of directors would be applied to senior management.

Presumptions

44. The effect of a presumption of continuing insolvency is that, if it is proved that a company was insolvent at a particular time during the 12 months ending on the date of commencement of its winding up, it would be presumed that the company was insolvent throughout the period beginning at that time and ending with the winding up of the company. This would prevent responsible persons defending an application for trading while insolvent by claiming that the company was actually solvent at a particular date, or for a certain period, during the period between the date when insolvency is shown and the date of winding up. Where circumstances of insolvency are established as having existed at a particular time within 12 months of winding up, it would shift the burden of proving the contrary on to the responsible persons.

45. If it is proved that a company had, at a particular time during the 12 months ending on the date of commencement of the winding-up, contravened section 121 of the Companies Ordinance by failing to keep proper accounting records there should be a presumption that the company was insolvent throughout the relevant period.

Defences

46. A director should have a defence to an application against him for insolvent trading if he could satisfy the court that, at the time when he knew or ought to have known that the company was insolvent or would become so or that there were reasonable grounds for suspecting that the company was insolvent or would become insolvent, he took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken. For the purposes of the defence, the facts which a director ought to have known or ascertain, or the conclusions which he ought to reach and the steps he ought to take, are those which would be known and ascertained, or reached or taken, by a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and the general knowledge, skill and experience that director has.

47. A senior manager would have a defence to an application against him for insolvent trading if he could demonstrate that he had given the board of directors notice in the prescribed form that a company was trading insolvently or was about to trade insolvently.

Responsible persons may be liable to compensate the company

48. If the court finds a responsible person liable for insolvent trading it should be able to order the responsible person to pay compensation to the company for the benefit of the general body of creditors which would equal the general deficiency when it was wound up. It should be left to the discretion of the court to decide the amount of compensation that should be awarded against a responsible person as the actions of each responsible person would have to be judged separately. Compensation recovered should be paid to the company for the benefit of the general body of creditors in accordance with the existing priorities, unless the court orders otherwise.

49. If the court makes a declaration that a responsible person, whether he is a director or senior manager, is liable to pay compensation for insolvent trading, the court should have the discretion to make an order disqualifying that person from being a director of

any company under Part IVA of the Companies Ordinance. If a person acted as a director of a company which went into insolvent liquidation at a time when he was disqualified as a director under Part IVA of the Companies Ordinance, he may be held liable for the debts of the company.

Annex C

Consultation Paper on Corporate Rescue and the Protection of Wages on Insolvency Fund (Treatment of Employees in "Provisional Supervision")

Problem

There are incompatibilities between some recommendations in the scheme proposed by the Law Reform Commission's ("LRC") Report on "Corporate Rescue and Insolvent Trading" and the existing labour legislation. It is necessary to resolve these incompatibilities if the Government were to take forward the relevant proposals.

Comments sought

2. Comments are sought on how employees' outstanding entitlements should be settled if the company which owes these debts initiated a corporate rescue procedure.

Background

Why Hong Kong needs corporate rescue (also known as "provisional supervision")

3. At present, companies that get into financial difficulties may try to come to an arrangement with their creditors by means of a non-statutory arrangement or by means of the arrangement and reconstruction provisions under section 166 of the Companies Ordinance (the "CO"). However, there is no *moratorium* (that is, stay of proceedings) thus nothing in either procedure to prevent a single breakaway creditor withdrawing from the negotiations and presenting a petition to wind up the company, thereby sink any rescue arrangement. In this particular aspect, therefore, there is a clear deficiency in section 166 of the Ordinance.

The Law Reform Commission's proposal on corporate rescue

4. The LRC Sub-committee on Insolvency examined the issue in 1995 and circulated a consultation paper for public comments. In that paper, the Sub-committee recommended a statutory corporate rescue, also known as "*provisional supervision*", to be introduced to facilitate a company in working

out a voluntary arrangement with creditors. The aim is to provide a procedure with guaranteed court protection at the outset to allow a *provisional supervisor* to work out some arrangements that would assist a viable business to survive, in whole or in part, as a going concern than for it to be simply wound up. During the 3-month public consultation, the Sub-committee received a total of 30 substantive submissions. Apart from one submission which expressed serious reservation about the proposal and questioned the need for "Government-mandated" intervention in corporate failure at all, the Sub- committee found the balance of the opinion to be strongly supportive.

5. Subsequently, the LRC substantially supported the Sub-committee's recommendations and issued the final report on "Corporate Rescue and Insolvent Trading" in October 1996 endorsing the introduction of a statutory corporate rescue in Hong Kong. The LRC considered that it would benefit the company's shareholders, general creditors, the secured creditors as well as employees who would otherwise lose their jobs consequent to the winding up of the company.

Main features of corporate rescue/provisional supervision

6. The main features of provisional supervision are as follows -

(a) the imposition of a ***moratorium*** against the company, initially for 30 days but which can be extended by the court for up to 6 months or even beyond with the consent of the creditors, the effect of which is to prevent individual creditors including *employees* from exercising their normal right to take proceeding and to preserve the assets of the company while a proposal is prepared for consideration by creditors;

(b) the appointment of a ***provisional supervisor***, an independent qualified third party who would take control of the company as soon as he is appointed and formulate a proposal within a certain time frame to be put to the creditors which are bound by the moratorium;

(c) the procedure would be initiated by either the company's directors or members, or a receiver or a liquidator if the company has gone into receivership/provisional liquidation, but not the creditors; and

(d) the moratorium should cease upon a resolution passed either to terminate the provisional supervision or that the company should

be wound up or on approval or rejection by creditors of a voluntary arrangement plan.

The draft legislation

7. Most of the recommendations in the LRC report deal with the technical and procedural requirements for the initiation and implementation of a provisional supervision. A draft bill following the LRC's recommendations has been substantially completed[1]. One particular issue - the settlement of employees' arrears of wages and other entitlements - nevertheless requires further deliberation because the LRC's proposals, if accepted, would be incompatible with existing labour legislation.

Effect of the moratorium on employees - claim on PWIF impaired

8. As the legislation stands, those employees who are laid off by the company under provisional supervision will not be able to make a claim for ex-gratia payment from the Protection of Wages on Insolvency Fund (PWIF), which is only triggered by the presentation of a winding-up petition to the court against the company. On a provisional supervision, employees could therefore be cut out and left without the prospect of any interim relief payment from the PWIF, in the absence of a winding-up petition against the company. In addition, given that a moratorium is in force, those affected employees are disallowed from filing any winding-up petition hence their right to the PWIF is further impaired.

LRC's proposal on treatment of debts owed to employees

9. The LRC recognised this problem and considered that-

(a) it would be desirable for employees who have been laid off as a consequence of provisional supervision to be accommodated under the provisions of the Protection of Wages on Insolvency Ordinance;

(b) until that happens, the debts owed to employees which in every winding up are preferential payments under section 265 of the CO will be paid in priority to all other claims out of the assets coming into the hands of the provisional supervisor; and

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1 Working draft of the draft legislation available for information on request.

(c) for employees who remain with the company and are owed arrears of wages from before the appointment of the provisional supervisor, such arrears should be given the same priority given to the wages of the employees who have been laid off.

Problem - Incompatibilities with existing labour legislation

LRC proposal (a) - widening the ambit of PWIF = subsidising employers and possible contravention of the Employment Ordinance (the "EO")

10. The LRC's proposal in paragraph 9(a) above would involve expanding the ambit of the PWIF, and this would change fundamentally the rationale for which the Fund is set up. To allow employees laid off by provisional supervision to be paid out straight from the Fund would be tantamount to subsidising the employers who are then relieved from their statutory obligation to pay their employees upon termination of contract/service. There might be abuse of the scheme by unscrupulous employers who try to evade such responsibility under the disguise of corporate rescue. There might also be significant financial implications on the PWIF.

11. Furthermore, in reality, payment from the PWIF does not necessarily cover the full amount of the employees' entitlements which are statutorily required to be paid by an employer in accordance with the provisions of the EO. The requirements in the EO are aimed at protecting the employees' rights. This proposal may be in breach of the provisions of the EO.

LRC proposal (b) - preferential payment under the CO significantly fall short of employees' entitlement under PWIF

12. The proposed arrangement in paragraph 9(b) above proposing to treat employees' arrears as priority debts under the CO are not practicable for the simple reason that in monetary terms, it falls short of the level of protection that employees could get from the PWIF by a very significant margin - maximum of $200,000. The current maximum amount of ex-gratia payments made by the PWIF are $36,000 for arrears of wages, $22,500 for wages in lieu of notice and $36,000 plus 50% of excess entitlements for severance payment, up to a maximum of about **$211,500**. By comparison, the maximum amount an employee could get as priority debts under the preferential limits stipulated in the CO is only **$18,000**, which is the aggregate of $8,000 for arrears of wages, $2,000 for wages in lieu of notice and $8,000 for severance payment. There is therefore no incentive for employees to accept this arrangement.

LRC proposal (c) - employees continue with the company but are owed wages from previous employment = possible contravention of the EO

13. The LRC proposal in paragraph 9(c) above may cause the provisional supervisor to be in breach of section 31 of the EO, which provides that "no person shall enter into, renew or continue a contract of employment as an employer unless he believes upon reasonable ground that he will be able to pay wages due under the contract of employment as they become due. The employer, without reasonable belief that he can pay wages, shall forthwith take all necessary steps to terminate the contract in accordance with its terms". Hence the provisional supervisor, who is in law the agent of the company, would be in breach of the EO if he continues to employ some employees during the moratorium while at the same time fails to clear all their arrears of wages owed before his appointment.

Protection of employees' rights

14. Can some sort of exemption under the EO be given to companies undergoing corporate rescue? We consider that the possible contravention of the EO as identified from the LRC proposals represent some of the most fundamental protection of employees' rights in Hong Kong. There is no question of exemption for any employer from those provisions unless there are compelling grounds.

15. The LRC proposals are therefore "incompatible" with the provisions of the PWIO and the EO, and might create financial hardship to certain employees. If corporate rescue scheme were to be introduced, the position with regard to employees must be that the level of protection that they can obtain should be no less favourable than what they are entitled to under the existing legislation.

Who to pay the employees?

16. The crux of the matter now is to identify the appropriate party to pay the employees' outstanding debts owed by a company which initiated corporate rescue.

The PWIF? (Option A) (LRC proposal)

17. Although employees laid off as a consequence of a company going into provisional supervision would not be, strictly speaking, employees of a

company in liquidation, the reality is that they would have been if corporate rescue had not been available. The PWIF has to pay later if not sooner.

18. However, this option raises a fundamental issue - the purpose of the PWIF. Policy-wise, making unconditional payment to workers laid off by the provisional supervision would be tantamount to granting a loan to bail out the_company, in effect turning the Fund into a "Corporate Rescue Fund", since a company in provisional supervision is a going concern. Since its establishment, the policy intention of the Fund has been to provide ex-gratia payment to workers only in the event their employer is insolvent. The proposed expansion of the scope of the Fund will drastically alter the nature of the Fund and represent a fundamental change to the purpose for which it has been set up.

19. There could be significant impact on the PWIF, although it is difficult to give an assessment of the financial and resource implications involved as no one can predict how many corporations will be in need of rescue and the number of employees affected. We believe that in a period of economic downturn, more companies would resort to corporate rescue hence there would be definitely be a heavier drain on the Fund.

20. A question therefore arises as to where should the Fund turn to for additional funding if necessary. In addressing this issue, it is important to bear in mind the underlying spirit and principle of the PWIF, which is to help the business sector support itself in meeting its obligations as employers. There is thus no question of the use of public funds to "bail out" the PWIF should its finances become inadequate as a result of its ambit expanded to facilitate businesses undergoing corporate rescue.

Financial position of the PWIF

21. The PWIF is funded by a levy on business registration certificate, which is at present $250 per certificate per annum. Since its establishment in 1985, the PWIF has accumulated assets amounting to $852 million to the end of March 1998. Whilst in past years the PWIF used to have an excess of income over expenditure, the situation reversed in 1997/98, when the Fund registered a deficit of $25 million. In 1998/99, the deficit is expected to increase further to **$90 million**. It should be pointed out that the full impact of the recent downturn of the economy on the PWIF has yet to be felt. Apart from a very substantial increase in the number of applications to the PWIF, it is noteworthy that a single big insolvency case such as Yaohan could involve total payments from the PWIF to the tune of over $67 million. It is therefore important that the PWIF should maintain a healthy reserve to enable it to cope with all

contingencies. Thus, it should be made clear from the outset that Option A would entail an upward adjustment to the current PWIF levy of $250. While it is difficult to assess the impact on the Fund, it would be prudent not to leave the issue of increasing the levy to the stage when the Fund runs into financial difficulties as a result of payments made in cases of corporate rescue.

The Employer? (Option B)

22. Legally speaking, it is the statutory duty of the employer to pay an employee's wages and entitlement in full as and when his service to a company is being terminated. If an employer cannot even pay his employees, it cast doubt on whether a corporate rescue scheme is likely to succeed. This perhaps indicates that the company should have moved into provisional supervision at a much earlier date.

23. Realistically, it would be impractical in demanding a financially- troubled company to pay a lump sum upfront to clear its indebtedness to employees before it goes into provisional supervision. It would put a heavy financial burden on the company and might instead exacerbate the financial hardship of the company and speed up its collapse. Or, it would make it so difficult that very few, if any, companies can actually benefit from the new scheme.

24. In some cases, a troubled company which may be suitable for rescue will in normal order of things has a severe cash flow problem but may have orders on its books and may in some cases have not readily realisable or collectable assets. Such a company will be unable to find the cash or obtain finance prior to the rescue to settle its liabilities to employees. It is also impractical and unrealistic to expect insolvency practitioners to take on the role of a supervisor to such companies where their fees are in jeopardy of being paid. In the circumstances, a full liquidation would appear the only solution and this would create further unemployment which is contrary to the general intention of implementing corporate rescue.

Exempting all employees from the moratorium? (Option C)

25. This will allow employees to exercise their rights to petition for the winding-up of the company anytime even when the latter is in provisional supervision. This will preserve employees' rights to the PWIF and upon the presentation of a winding up petition of the company to the court, the PWIF Board may make payment to employees.

26. The obvious downside of this option is that it will put the provisional supervisor under continuous threat and defeat the purpose of the moratorium which should enable the provisional supervisor to take on his task in relative peace and be guaranteed court protection from the outset. It will be up to the court to decide whether the petition should be granted or stayed. Likewise, there would be financial implications on the PWIF whose scope in essence has been broadened and this would entail an upward adjustment of the $250 PWIF levy.

The practice in other jurisdictions

27. Corporate rescue, or similar schemes, are practised in various jurisdictions, such as the US, UK, Canada, Germany, Australia, Japan and Singapore. In most cases, we do not find any specific provisions addressing the settlement of employees' arrears when a company went into provisional supervision. The arrangements seem to vary from place to place, depending on whether there are other supporting benefits exist for the unemployed and the social/welfare/labour conditions in those respective economies. For example, in the US Bankruptcy Code Chapter 11 and Japan's Corporate Reorganisation Act 1952, outstanding wages of former employees of a company undergoing an equivalent statutory rescue scheme are normally treated as a priority debt (subject to certain limits) in a rescue plan[2]. The UK Insolvency Act 1986 provides that the preferential debts of employees, which are similar to those in section 265 of the CO, must be given priority in a company voluntary arrangement unless the preferential creditors agree otherwise.

Employees' debts as priority debts (Option D)

28. The question arises as to whether we could follow the practice in other jurisdictions, that is, to accord priority to employees' debts in a rescue plan. The main drawback in this arrangement is that the employees might have to wait a long time, ranging from 30 days to 6 months or more before it is known whether there would be a rescue plan. This might create financial hardship to employees in the interim period.

29. The alternative will be to allow these employees to first seek relief from the PWIF, which will then seek 100% repayment from the company as a priority debt in a rescue plan of the company in provisional supervision. Under this arrangement, the obligation to pay still rests with the employer, but allowing employees to have quicker relief. The requirement that the payment

[2] or, as "administrative claims" in the case of Japan which has to be paid before priority claims in a rescue plan.

so made out by the PWIF be treated as a priority debt in a voluntary arrangement plan will ensure that the PWIF have a higher chance to recoup the funds. If the company went from provisional supervision into liquidation eventually, the PWIF would have its ordinary subrogation rights in respect of employees in accordance with the provisions of the Ordinance.

30. Under the option, the PWIF will have to shoulder at least initially the financial costs of paying off employees of companies that went into provisional supervision. In other words, this would have constituted a fundamental change in the use of the Fund. In addition, similar to Option A, any additional funding needed to maintain the health of the PWIF would have to come from an upward adjustment of the annual $250 levy, although the magnitude of the increase of the PWIF levy may be somewhat smaller depending on the success of the PWIF in securing recourse. In addition, given that this payment so made has to be treated as a priority debt, it may take longer time for the major creditors to reach an agreement on a voluntary arrangement, if any.

31. It is recognised that Option D is in effect very similar to Option A in the sense that it would also be tantamount to granting a loan to bail out the company whilst the latter remains a going concern during provisional supervision. This may turn the PWIF into a "Corporate Rescue Fund" and hence represents a fundamental change to the purpose for which the PWIF was set up. The only difference is the provision of allowing PWIF to seek 100% repayment from the company as a priority debt in a rescue plan of the company afterwards. The essence of this arrangement is to tie the financially-troubled company over the short term liquidity problem which it might be facing.

32. It must be further pointed out that like Options A and C, Option D will also not be able to resolve the problems as identified in paragraphs 10 & 11 above relating to the incompatibilities with the EO and the concern over potential abuse by unscrupulous employers who may try to evade their statutory responsibilities under the disguise of corporate rescue. In such circumstances, these employers will stand to benefit from the PWIF at the expense of the legitimate interests of those employees of genuinely insolvent employers which the PWIF is intended to protect.

Summary of options

Option A - PWIF to pay (LRC proposal)

- **immediately widen the ambit of the Protection of Wages on Insolvency Ordinance to accommodate employees affected by provisional supervision.**

Option B - employer to pay in full prior to initiating corporate rescue

- **to require the company to clear all arrears of wages before it undergoes corporate rescue.**

Option C - to exempt all employees from the *moratorium*

- **Employees not bound by the moratorium and may petition anytime to the court for its winding up. PWIF to pay upon presentation of a winding-up petition against the company by employees but the company may, instead of being wound up, continue as a going concern under corporate rescue.**

Option D - PWIF to pay first, then seek 100% recourse from the company as a priority debt in a voluntary arrangement

- **Widen the ambit of PWIF to allow employees get quick relief but simultaneously require that payment so made by PWIF be treated as a priority debt in a voluntary arrangement plan of the company.**

The Way Forward

33. We welcome views on the above four options. Any other suggestions on how to deal with the debts owed to employees by a company undergoing corporate rescue are also welcome. Please send your comments to Financial Services Bureau, 18/F, tower 1, Admiralty Centre, 18 Harcourt Road, Hong Kong for the attention of Assistant Secretary for Financial Services (Companies (1)) by 28 February 1999.

Financial Services Bureau
2 December 1998
Ref.:C2/1/11C(98)VI

Annex D

Legislative Council
Panel for Financial Affairs

Report on consultation on Proposed
Statutory Procedures for Corporate Rescue

Introduction

This paper reports to Members on the results of Government's consultation exercise on the Law Reform Commission's ("LRC") proposal of using the Protection of Wages on Insolvency Fund ("PWIF") to accommodate claims of employees who are laid off by companies entering into corporate rescue and inform Members of the Administration's stance on the way forward.

Recommendation

2. We propose to proceed with drafting legislation to provide for statutory corporate rescue in Hong Kong, with a condition that the company undergoing corporate rescue must be responsible for clearing all arrears of wages, severance pay and other statutory entitlement of its employees as if it is a going concern.

Background and Argument

The LRC recommendations

3. The LRC proposed in its Report in October 1996 that Hong Kong should have a statutory corporate rescue procedure which provides a 30-day moratorium for viable businesses to try to reach a voluntary arrangement with their creditors so that the company concerned can continue as a going concern, in whole or in part, thus saving it from going straight into liquidation. During the moratorium, creditors cannot petition to the court for a winding up order against the company.

4. Recognizing that the employees of the company who are laid off by the company undergoing corporate rescue (also known as provisional

supervision) might be cut out and left without the prospect of getting an interim payment from the PWIF, the LRC suggested that the PWIF should be used to meet the outstanding claims of those employees who are laid off by a company under provisional supervision. Specifically, this would mean that the PWIF would need to be extended to cover the outstanding arrears of wages, severance pay and other statutory entitlement of the following categories of employees laid off by the company during the "relevant period" ((a) and (b) below) -

(a) before the initiation of corporate rescue; and

(b) in the first 14 days of corporate rescue, whereby their employment contracts are not accepted by the provisional supervisor under the LRC proposal.

The need for public consultation

5. In the course of implementing the LRC proposal, we identified some incompatibilities between the LRC's proposal, and the Employment Ordinance ("EO") and Protection of Wages on Insolvency Ordinance ("PWIO"), regarding the rights of employees. In view of the controversy and conflicting interests inherent in the LRC proposal, we considered it necessary to conduct a public consultation exercise to gauge the views of the various interested parties, in particular the employers' and the employees' organizations, the banking and financial sectors and practitioners who are involved in corporate rescue. We would like to take into account their views before we formulate the Administration's stance on the matter.

Public consultation and results

6. The public consultation period lasted from 22 December 1998 to 31 March 1999. Our consultation paper put forward four options for parties to comment, namely -

Option A: the LRC proposal as set out in paragraph 4 above;

Option B: The company must clear all arrears/statutory entitlement of employees that it laid off during the relevant period;

Option C: Exempting employees from the moratorium so that their right to petition to wind up the company would be preserved; and this would enable employees to make a claim on the PWIF upon the presentation of a winding up petition; and

Option D: PWIF to pay the employees first if they are laid off during the relevant period and the full amount to be recouped from the company as priority debt in a voluntary arrangement among creditors.

In total, we have received 26 submissions. A list of the respondents is at Annex.

7. We briefed the Legislative Council Panel on Financial Affairs and Panel on Manpower jointly on 1 February 1999. Views expressed at the Panel meeting were fairly divided. Some members expressed concern over whether employees' rights would be compromised under the proposed scheme. Some considered that the LRC proposal - with some modification - should be workable, whilst others expressed support for option D.

8. Among the 26 submissions, views received were diametrically opposite. Representative bodies of those who are most directly affected by the proposed rescue procedures namely, employers and employees were unanimously against all four options. They were strongly against any change in the use of the PWIF, notwithstanding their pledge of "in principle" support for the concept of corporate rescue.

9. There is widespread concern among the employer/employee sectors that there were no effective safeguards of the rescue scheme against possible abuses: namely (a) the moratorium may allow the non-viable business to delay repayment at the expense of creditors; (b) unscrupulous employers may first lay off employees and then evade the statutory responsibility of paying arrears of wages/entitlements to these employees by passing the burden to the PWIF. They considered that the PWIF should not be the vehicle for financing the proposed corporate rescue. Both the Labour Advisory Board and the PWIF Board expressed strong reservation on making use of the PWIF to bail out private corporations and implement the proposed corporate rescue scheme.

10. There was also concern that small and medium enterprises (SMEs) were unlikely to benefit from the proposed corporate rescue scheme. The professional fees to be incurred in a corporate rescue would put the proposed regime beyond the reach of average SMEs.

11. As for the insolvency professionals and practitioners who are involved in a corporate rescue, they were broadly in favour of Option A or with some modification as they believed this to be the only workable option. They considered that the concerns about possible abuse were either not well-founded or could be satisfactorily dealt with. The financial sector supported Option D

as they considered this to be the fairest or most practicable option and that employees would not be prejudiced. There was marginal support for Options B and C.

Analysis of the Results

12. The consultation reveals that neither employers nor employees see any benefit in extending the use of PWIF to statutory corporate rescue. This has in effect closed the door for Options A, C and D referred to in paragraph 6 above.

13. Some respondents suggest that we should consider setting up a separate "corporate rescue fund". Funding for this option would be a major consideration. The business sector will be against any increase in the cost of doing business. We are also mindful that any subsidy by Government towards such a new fund will invite criticisms that tax-payers are made to bail out businesses.

Proposed option

14. The above analysis prompted us to revisit Option B, under which the company undergoing corporate rescue must be responsible for clearing all arrears of wages, severance pay and other statutory entitlement of its employees <u>as if it is a going concern.</u>

15. The merits of this option are -

(a) employee's rights are fully protected in line with existing labour legislation;

(b) it does not involve the PWIF in its operation;

(c) it does not require any contribution from the tax-payers or increase in the $250 PWIF levy or business registration fee for the creation of a new fund; and

(d) it would help remove opportunities for possible abuse of PWIF or any new fund in the course of corporate rescue.

16. One of the key conditions laid down by the LRC for extending the statutory procedures of corporate rescue to a company is that it must be a <u>viable</u> business worth rescuing. We understand from the market that the requirement under this option would be an effective tool to screen out the non-viable

companies which should not have been qualified for statutory corporate rescue in the first place. According to market sources, the clients of most informal "work-outs" at present are public companies listed in Hong Kong with a market capitalization of $100 million - $150 million. Given their size, potentially viable companies undergoing corporate rescue are expected to be able to pay their employees. As these payments are not significant compared with the debts owed by the companies, they would unlikely pose any material impact on the success of a work-out. The more likely situation was that if a company could not even pay his employees, it should cast serious doubts on whether a corporate rescue scheme would likely succeed.

17. We believe that this option will provide an additional safeguard against possible evasion of statutory obligations towards employees by unscrupulous employers through corporate rescue. Under the LRC proposal, in the first 14 days of the rescue, the provisional supervisor has the option to accept/not to accept employment contracts that are in force immediately before the initiation of corporate rescue. In other words, the provisional supervisor may lay off (some) employees in order to rescue the company and the laying off exercise would be financed by the PWIF. Under our recommended option, any laying off exercise will be financed by the assets of the company coming into the hands of the provisional supervisor. This would help ensure that the lay-off is cost-effective and kept to an optimal scale.

Gate-Keeping Role of the Provisional Supervisor

18. Some respondents have expressed concern about the gate-keeping role to be performed by the provisional supervisor who will decide whether a company is viable and hence worth rescuing, and whose advice the Court would rely upon heavily in deciding whether the 30-day moratorium should be extended.

19. We appreciate the concern. If we are to introduce statutory corporate rescue, we should pay particular attention to the need for adequate checks and balances to ensure proper gate-keeping by the provisional supervisor to ensure that only viable businesses should be allowed to be rescued, and that the moratorium should not be used by non-viable companies to delay repayment.

The Way Forward

20. On balance, we suggest that we should modify the LRC proposal and adopt the prudent approach of requiring a company undergoing corporate rescue to be responsible for clearing all arrears of wages, severance pay and other statutory entitlement of its employees as if it is a going concern. We

realize that this modification would make the company rescue operation to be conducted by a provisional supervisor more challenging than under the LRC proposal, but at least we would be able to allow the new scheme to make a start.

21. The scheme would be a first step to improve the existing voluntary corporate rescue procedures, and provide a meaningful statutory option for really viable businesses to continue operating. It would enable practitioners to build up the required expertise and experience, as well as the community to test the system for possible abuse. It would also allow the scheme to build up a good track record, and earn sufficient public confidence and respect for any possible expansion.

22. Our intention now is to complete the draft legislation and submit it to the Legislative Council for consideration in the 1999/2000 Legislative Session.

Financial Services Bureau
2 June 1999

Annex E

Ref: C11/10(99)Pt.13

LEGISLATIVE COUNCIL BRIEF

REPORT OF THE STANDING COMMITTEE ON COMPANY LAW REFORM

INTRODUCTION

At the meeting of the Executive Council on 28 September 1999, the Council took note of the information below.

BACKGROUND

2. The Standing Committee on Company Law Reform (SCCLR) was formed in January 1984 to advise the Financial Secretary on necessary amendments to the Companies Ordinance (the Ordinance) as and when experience shows them to be required. It also advises the Financial Secretary on amendments required to the Securities Ordinance and the Protection of Investors Ordinance with the objective of providing support to the Securities and Futures Commission in its role in administering those Ordinances.

3. The SCCLR is required to report annually, through the Secretary for Financial Services, to the Chief Executive in Council on amendments that are under consideration. It now submits its Fifteenth Report covering the subjects discussed by the SCCLR at eight meetings during the year 1998/99. Copies of the Report are available at the Legislative Council Secretariat. The eight major topics covered by the Report are highlighted below.

MAIN AREAS COVERED

Overall Review of the Companies Ordinance
(Chapter 1 of the Report)

4. During the year 1998/99, the Consultancy Report on the Review of the Hong Kong Companies Ordinance (the Consultancy Report) continued to

be a major item of discussion for the SCCLR. The SCCLR carried on with its comprehensive examination of the Consultancy Report in all but one of its eight meetings within the year. The SCCLR considered recommendations contained in five (out of a total of 12) chapters. Subjects covered were -

- General Recommendations for a New Business Corporation Ordinance;
- Fundamental Changes;
- Solvent Dissolution and Liquidation;
- Private Companies/Closely Held Corporations; and
- Foreign Corporations/Overseas Companies.

In addition, the SCCLR had considered the 28 written submissions on the Consultant's recommendations from a wide section of the community, including the accounting, banking, company secretarial, commercial and legal sectors.

5. At the 135th meeting, the SCCLR decided that further research ought to be undertaken on the subjects upon which the Consultants had made recommendations and public comments had been received, as well as topics upon which the Consultants had made no recommendations. It was then agreed at the 136th meeting that in order to speed up the process, small task force groups chosen from among SCCLR members be set up to discuss further and make draft reports on specific topics and areas of the Consultancy Report. The drafts would then be submitted to the full SCCLR for deliberation. The SCCLR endorsed at its 137th meeting in March 1999 the first paper on "creditor protection" produced by the small task group. So far, the SCCLR has already considered a further six papers.

6. The SCCLR planned to submit to the Government its report on all recommendations made by the Consultants early next year.

Consultation Paper on the Winding-up Provisions of the Companies Ordinance prepared by the Law Reform Commission's Sub-Committee on Insolvency
(Chapter 2 of the Report)

7. The Law Reform Commission's Sub-Committee on Insolvency prepared a consultation paper on the winding-up provisions of the Ordinance in April 1998. In the paper, the Sub-Committee made a number of proposals on the winding-up procedures including -

(a) the enactment of a separate insolvency ordinance;

(b) a new licensing regime for insolvency practitioners; and

(c) the principle of pari passu distribution to be re-established as the fundamental point of distribution in a winding-up (that is, the removal of preferential payments to certain classes of creditors).

8. The Secretary of the Sub-Committee was invited to attend the 131st meeting of the SCCLR to present the consultation paper. Apart from a few specific concerns, the SCCLR found the proposals generally acceptable. The Law Reform Commission released the Report on the Winding-up provisions on 27 July 1999.

Directors' Index
(Chapter 3 of the Report)

9. The proposal by the Registrar of Companies to remove the requirements under sections 158 and 333 of the Ordinance on listed companies to report to him the particulars of other directorships held by their directors and any changes on their directorship was endorsed by SCCLR at its 132nd meeting. The relevant legislative amendments have been incorporated in the Companies (Amendment) Ordinance 1999 enacted on 30 June 1999. The proposal would be implemented later this year.

Appointment of Provisional Liquidators under section 194(1)(a) and other Consequential Amendments
(Chapter 4 of the Report)

10. At present, the Official Receiver automatically becomes the provisional liquidator on the making of a winding-up order by the Court under

section 194 of the Ordinance. In order to reduce the caseload of his office arising from the increase in number of compulsory winding-up cases in recent years, the Official Receiver has implemented, since September 1997, a scheme for contracting-out summary winding-up cases to the private sector insolvency practitioners. However, one of the major difficulties facing the Official Receiver in the operation of the scheme is that, as the law now stands, in every case he has to become initially the provisional liquidator and thereafter the liquidator, and the private sector insolvency practitioner can only act as his agent. The Official Receiver has to specifically authorise the insolvency practitioner to carry out various aspects of the winding-up while the ultimate statutory responsibility still rests with the Official Receiver. This has turned out to be both time consuming and costly, and has failed to reduce the overall workload of the Official Receiver as has been hoped. It has also made the Official Receiver (and the Government) vicariously liable for the acts and deeds of the insolvency practitioner if the latter acted negligently given that he is only an agent of the Official Receiver in those cases.

11. At the 132nd meeting, the SCCLR discussed the proposal by the Official Receiver to amend section 194 of the Ordinance with a view to addressing the problems arising from paragraph 10 above. The Official Receiver proposed that he should be given the authority to directly appoint a suitably qualified and experienced person from the roster of prequalified private sector insolvency practitioners which he administered and that person would be the provisional liquidator of the company on the making of the winding-up order, and afterwards the liquidator. The proposal would not only relieve the caseload burden of the Official Receiver, but also help to remove the Official Receiver's and the Government's liability over negligence by the insolvency practitioners in respect of cases contracted out by the Official Receiver.

12. The SCCLR originally had some concern over the degree of control that could be exercised over such appointed provisional liquidators by the Official Receiver. To address the SCCLR's concern, the Official Receiver further proposed at the 133rd meeting to restrict the power of the provisional liquidator so appointed to have only the authority to dispose of perishable goods or assets that are likely to diminish significantly in value up to a maximum aggregate amount of HK$100,000. All other sales, including any sales to directors or associates of companies, would need the consent of the Official Receiver or the Court. The proposal was endorsed by SCCLR. Legislative amendment to implement the proposal is being prepared.

Date of Filing of Annual Returns by Private Companies
(Chapter 5 of the report)

13. Under sections 107(1) and 109(1A) of the Companies Ordinance, the due date for the filing of annual returns for a private company with a share capital (private company) is tied to the date of its incorporation. The situation is, however, complicated by the provision of section 107(3) which allows a company not to file a return if it is not required by section 111 to hold an annual general meeting (AGM) during the following year, in that year. Section 111 allows a newly formed company to hold its first AGM within 18 months of its incorporation.

14. The combined reading of sections 107 and 109 has caused confusion as to when a newly incorporated private company should file its first annual return - whether it is in the first anniversary of incorporation or in the second anniversary? The date of incorporation, the due date for holding the first AGM and the actual date of AGM all need to be taken into account in this regard. This has made the situation unnecessarily complicated and in some cases led to unintended late filings and attracted higher filing fees.

15. At its 134th meeting, the SCCLR considered and endorsed a proposal by the Registrar of Companies of simplifying the filing requirement of first annual return of private companies by simply requiring them to file the returns within 42 days after every anniversary, regardless of when the companies held their first AGM. Legislative amendment to implement the proposal is being prepared.

Statutory Procedure to Deregister Solvent Defunct Private Companies
(Chapter 8 of the Report)

16. At the 136th meeting, the Registrar of Companies proposed to introduce a new statutory deregistration procedure for solvent, defunct private companies. The objective was to provide for a simple, inexpensive and convenient procedure for the business community to dissolve companies and to prevent the abuse of the striking-off procedures under sections 290A and 291 of the Ordinance by the private sector. The SCCLR endorsed the proposal and the necessary legislative amendments have been incorporated in the Companies (Amendment) Ordinance 1999 enacted on 30 June 1999. The new procedure would be implemented later this year.

Resolution without Meeting by Unanimous Written Consent
(Chapter 9 of the Report)

17. At its 115th meeting, the SCCLR agreed to establish a Sub- Committee to review section 116B of the Ordinance, which provides that a resolution in writing signed by all members is deemed to be a resolution having been passed at a duly convened general meeting, and to advise whether this section should/could override other provisions in the Ordinance which allow certain powers or functions of a company to be exercised only in general meetings.

18. The SCCLR discussed the report of the Sub-Committee at the 137th meeting and endorsed the proposal to amend section 116B along the relevant provisions of the UK Companies Act 1985. Under this proposal, a company is able to dispense with the holding of general meetings provided that **unanimous** written resolutions are used instead. It further provides that such resolutions must be signed by or on behalf of **all** the members of the company, **and** that a copy of the proposed written resolution must be sent to the auditors of the company. If it concerns them as auditors, they have seven days in which to say that in their opinion the resolution should be considered by a general or class meeting. Exceptions to the use of unanimous resolutions are the removal of directors or auditors from office before the expiry of their term of office because both have a right to make representations at a general meeting of a company. Two other conditions that needed to be observed for implementing unanimous consent procedures are that -

(a) the necessary information must be made available to all shareholders before they sign the resolution; and

(b) the shareholder concerned should not vote on resolutions that are related to the repurchase by the company of his shares.

19. The SCCLR also agreed that if the aforementioned were done, section 111 which mandates the holding of an annual general meeting could also be dispensed with provided there was unanimous agreement of shareholders.

20. At the 140th meeting, the SCCLR accepted the Registrar of Companies proposal to apply the relevant provisions to all companies notwithstanding that, in the UK, the unanimous consent procedures are only applicable to private companies and companies limited by guarantee. Although

the proposed amendments are in theory applicable to all companies, in practice, it would be quite impossible for companies except those with a small membership to use these provisions in view of the need for the resolutions to be signed unanimously by all shareholders. This proposal will ease the administrative burden especially on small private/public companies by allowing them to conduct company business without the need to convene general meetings. Legislative amendment to implement the proposal is being prepared.

Treasury Shares
(Chapter 10 of the Report)

21. Currently, a listed company is permitted to repurchase its own shares out of distributable profits or the proceeds of a fresh issue of shares but shares so repurchased are automatically cancelled. As a result of a review conducted in 1998, the Securities and Futures Commission (SFC) proposed that it would be beneficial to relax the law to permit publicly listed companies to hold repurchased shares in treasury as it would give these companies greater flexibility for the better use of their capital and promote liquidity in the market, provided that safeguards were in place to guard against possible abuses. In addition, listed companies would have the freedom to hold their repurchased shares in treasury until they wished to use them again.

22. The SCCLR considered the SFC proposal at its 136th meeting. The SCCLR expressed its concern on a number of specific areas but eventually gave a qualified and very guarded approval to the proposal on condition that detailed proposals for the necessary legislative changes and the safeguarding regulations to prevent abuses and to enhance transparency had to be examined by the SCCLR before they were brought into force.

23. The latest development is that the SFC, having considered the low response rate at the end of the consultation period which ended in January 1999, concluded that there is no overwhelming pressure at present to change the current legislation to introduce treasury shares. A background note on treasury shares is at Annex A.

IMPLEMENTATION

24. Since its establishment in 1984, the SCCLR has made a total of 78 recommendations. Of these, 62 recommendations have been implemented and four are included in legislative proposals now being prepared. A progress

report on implementation of the recommendations is at Annex B.

PUBLICITY

25. A press release will be issued on 30 September 1999 to announce the publication of the Report.

ENQUIRIES

26. Mr Ting Lup-wong, Assistant Secretary for Financial Services (Companies) (Tel:2528 9077).

Financial Services Bureau
Ref: C11/10(99)Pt.13